

Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.

In the Matter of:

The Digital Performance Right in Sound Recordings and Ephemeral Recordings  (Webcasting Rate Adjustment Proceeding)	Docket No. 2005-1 CRB DTRA
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Volume 43

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Independence Avenue, S.E.  
Washington, D.C. 20540

Wednesday,  
November 22, 2006

The above-entitled matter came on  
for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge  
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge  
THE HONORABLE STAN WISNIEWSKI, Judge

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P-R-O-C-E-E-D-I-N-G-S

9:33 A.M.

CHIEF JUDGE SLEDGE: Mr. Handzo?

MR. HANDZO: Good morning, Your Honor.

CHIEF JUDGE SLEDGE: Good morning.

MR. HANDZO: Our witness this morning is going to be Jim Griffin. Before I put Mr. Griffin on, I wonder if the Court would like to take a minute just to talk about schedule. The one thing we don't have scheduled yet is the submission of findings of fact and conclusions of law by the parties.

CHIEF JUDGE SLEDGE: That's right.

MR. HANDZO: I've had some conversations at least with Mr. Joseph about that and we can make a proposal to the Court. I don't know if you would like it orally or what we were going to propose is that the findings be submitted on December 15 which I believe is a Friday, that we have rebuttal findings, if any, submitted on the following

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1 Tuesday which would be the 19th.

2 CHIEF JUDGE SLEDGE: The first day  
3 is what?

4 MR. HANDZO: The 15th of December.

5 CHIEF JUDGE SLEDGE: All right.

6 MR. HANDZO: Rebuttal findings on  
7 the 19th and closing argument on Thursday, the  
8 21st and I should also add that Mr. Joseph  
9 agrees with two-thirds of that proposal. He  
10 agrees that we should submit findings of fact  
11 on the 15th and have closing argument on the  
12 21st. He's less enthusiastic about the notion  
13 of rebuttal findings.

14 MR. JOSEPH: His views speaking  
15 for himself, Your Honor, being that the  
16 parties and the Court would be just as well  
17 served if we take that time to prepare for the  
18 closing and deliver any response that we have  
19 in the written findings and orally in the  
20 closing.

21 CHIEF JUDGE SLEDGE: All right.  
22 We will try to let you know something early

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1 next week on those days.

2 MR. HANDZO: Very well. Thank  
3 you.

4 MR. JOSEPH: Thank you.

5 CHIEF JUDGE SLEDGE: Mr. Handzo,  
6 how are we going to organize so everybody can  
7 see the screen?

8 MR. HANDZO: I think what I'm  
9 going to do, Your Honor, since we appear to be  
10 having technical problems at the moment, is I  
11 will probably just play what I'm going to play  
12 at the very of Mr. Griffin's examination, so  
13 perhaps what we can do is if we haven't  
14 already gotten to a break, take a break, we'll  
15 set it up. For right now, I can just take the  
16 screen down.

17 (Pause.)

18 MR. HANDZO: SoundExchange calls  
19 James Griffin as its next witness.

20 CHIEF JUDGE SLEDGE: Mr. Griffin,  
21 if you will raise your right hand, please.

22 WHEREUPON,

JAMES GRIFFIN

WAS CALLED FOR EXAMINATION BY COUNSEL FOR  
SOUND EXCHANGE AND, HAVING FIRST BEEN DULY  
SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. HANDZO:

Q For the record, Mr. Griffin, would  
you just tell us your name?

A James Hazen Griffin.

Q Mr. Griffin, could you remind the  
Board what it is you do for a living?

A I run a company called One House  
LLC and I'm a media technologist and that's  
what the firm does.

Q You provide consulting services?

A I guess you could call them that,  
yes. Sometimes it's more than consulting, but  
it's all in the field of media technology.

Q What kinds of companies do you  
consult for or do work for?

A Technology companies on the one  
hand, media companies on the other. We think

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1 our prime function is absorbing their  
2 uncertainty about one another and bringing  
3 them together in business.

4 Q Can you give us a couple of  
5 examples of the kinds of companies, technology  
6 and media, that you work for?

7 A Sure. On the technology side, an  
8 example would be say Nokia or Yamaha. On the  
9 media side, say Viacom or Universal Studios or  
10 companies like that.

11 Q And you mentioned you absorb their  
12 uncertainty. You absorb their uncertainty  
13 about what?

14 A About one another, principally.  
15 Media companies are very concerned about  
16 technology and technology companies are very  
17 concerned about media companies and  
18 understanding each of them and their interests  
19 and the means they use to perform their  
20 business is our stock in trade.

21 MR. HANDZO: Your Honor, we  
22 offered Mr. Griffin last time and he was

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1 accepted as an expert in media and technology.  
 2 I would offer him again without going through  
 3 the entire voir dire, if that's acceptable.

4 CHIEF JUDGE SLEDGE: Any objection  
 5 to Mr. Griffin being accepted as an expert in  
 6 media and technology?

7 MR. LARSON: No objection, Your  
 8 Honor.

9 MR. JOSEPH: Not from me, Your  
 10 Honor.

11 MR. TAYLOR: Your Honor, we do  
 12 object.

13 CHIEF JUDGE SLEDGE: All right.

14 MR. TAYLOR: Again, we don't see  
 15 any basis upon which that this witness  
 16 qualifies as an expert to opine on  
 17 noncommercial broadcasting stations.

18 (Pause.)

19 CHIEF JUDGE SLEDGE: Mr. Handzo?

20 MR. HANDZO: Your Honor, the  
 21 thrust of what Mr. Griffin is testifying about  
 22 is, in essence, that there really isn't any

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1 difference between the noncommercial stations  
2 and the commercial stations on these issues.  
3 But I can ask him a few questions to  
4 demonstrate his knowledge, if the Court would  
5 like.

6 BY MR. HANDZO:

7 Q Mr. Griffin, in the course of your  
8 business, is it part of your business to know  
9 and to understand what noncommercial stations  
10 are doing?

11 A Yes.

12 Q Tell us why.

13 A Well, it's part of the competition  
14 for traditional commercial broadcasters. They  
15 have to compete for audience and for revenues  
16 with what we'll call, I guess we're calling  
17 them noncommercial stations here.

18 Q Tell us what you do to keep  
19 abreast of what noncommercial stations are  
20 doing?

21 A Well, I worked at a noncommercial  
22 station for four years and so I have some

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1 background and knowledge that I start with and  
2 I continue to monitor the development of those  
3 stations and especially the programming that  
4 they offer and the manner in which they  
5 approach sponsors and advertisers.

6 In my business, I guess they  
7 consider me a possible sponsor or advertiser,  
8 so they approach me relatively often with  
9 offers to sponsor shows. I've participated in  
10 programming some shows.

11 Q For example, in the course of your  
12 day-to-day work, do you go on websites of  
13 noncommercial stations?

14 A Oh, to be sure, yes.

15 Q Do you listen to their streams?

16 A I do.

17 Q Do you look at who they're hiring  
18 in their employment ads?

19 A Yes, that's very important to me.

20 Q And have you done shows for them?

21 A Yes.

22 Q Have you been a sponsor?

1           A     No, I have not personally.     My  
2 companies has not sponsored a show yet.

3           Q     Have you been approached?

4           A     Many times, continuing even this  
5 week.

6           Q     Do you know some of the people who  
7 run noncommercial stations?

8           A     I do.

9           Q     Give us an example.

10          A     Well, for example, I did a show  
11 for KCRW, so I've met their staff and know the  
12 people who run the station and have regular  
13 contact with them in the course of my work.

14          Q     KCRW is the noncommercial station  
15 located where?

16          A     Santa Monica, California, part of  
17 Santa Monica College.

18          Q     Do you know the owners?

19          A     Well, the owners, I guess, you'd  
20 say is the college. The person who runs the  
21 station is Ruth Seymour with some assistance  
22 from her daughter and her able staff of people

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1 including David Klienbart and others.

2 Q And have you had occasion to have  
3 conversations with those people?

4 A I have.

5 Q You mentioned that you ran a  
6 noncommercial station. When was that?

7 A In high school, we had our own  
8 traditional FM station. I had to get an FCC  
9 license as part of the process and so I got  
10 licensed by the FCC and participated fully in  
11 the station's affairs and was part of its  
12 management for four years.

13 Q And have you ever been involved in  
14 starting a station or a channel that would be  
15 competing with noncommercial stations?

16 A Sure. In my work at Viacom, for  
17 Infinity Radio, we started a station called  
18 KYOU that we thought was targeted precisely at  
19 that demographic or partly at that  
20 demographic.

21 Q And as a result of that  
22 experience, did you have to come to understand

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1 what it was that the noncommercial stations  
2 were doing?

3 A Yes, it's certainly a vital part  
4 of the radio dial, increasingly attracting  
5 listeners and part of the competition.

6 Q And the activities that you've  
7 described, going on their websites, listening  
8 to their streams, talking to people, is this  
9 sort of day-to-day activity for you?

10 A Yes. It's part of my work as  
11 opposed to part of my recreation.

12 MR. HANDZO: Your Honor, in  
13 response to Mr. Taylor's objection, I think  
14 what Mr. Griffin has demonstrated is that he  
15 spends a great deal of time looking at these  
16 stations because they are part of the  
17 competitive landscape that he consults with  
18 people on. And so he does have a great deal  
19 of knowledge about them and I would ask that  
20 the objection be overruled.

21 CHIEF JUDGE SLEDGE: Mr. Taylor,  
22 any questions?

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MR. TAYLOR: Yes, Your Honor.

VOIR DIRE

BY MR. TAYLOR:

Q Good morning, Mr. Griffin.

A Good morning.

Q Did you include any of this information in your statement, your rebuttal statement?

A Which information?

Q Any of the information that Mr. Handzo elicited from you this morning?

A I might have. I don't think I was supposed to lay out all my qualifications, but I don't think most of this came out in that, no. I don't think it was -- I didn't think it was in question.

Q So, in fact, you did not include any of this information in your rebuttal statement?

A Well, no. I don't think it would be fair to say that I did not include any of this information in my rebuttal statement

1 because my rebuttal statement, for example,  
2 included some of the job ads I found when I  
3 perused those sites and I mentioned just that.  
4 So that's one example. I suspect there are  
5 more.

6 Q Well, let's turn to what you did  
7 say. Isn't it a fact that when you work at  
8 the noncommercial radio stations, you were a  
9 DJ?

10 A I was a disc jockey?

11 Q Yes.

12 A Which one are you referring to?

13 Q At the noncommercial station that  
14 you did identify that you worked at?

15 A You mean KCRW? Is that what  
16 you're referring to?

17 Q That was the one that you  
18 identified, isn't that true?

19 A No, I referred to two.

20 Q Okay.

21 A When Mr. Handzo asked me  
22 questions, there was more than one and that's

1        why I'm asking you now whether you're  
2        referring to the first one or the second one.

3                Q        Were you a DJ at KCRW?

4                A        I wouldn't say that I ever touched  
5        a disc. So saying that I was a disc jockey,  
6        I think would be unusual.

7                Q        Did you program music at the  
8        station?

9                A        Did I program music? I don't  
10       think I programmed music.

11               Q        Did you have any responsibilities  
12       for the selection of music that was  
13       broadcasted on the station?

14               A        Not on the show I did.

15               Q        At the station?

16               A        No.

17               Q        Are any of your clients that you  
18       work for today, are they noncommercial radio  
19       stations?

20               A        No.

21               Q        Have you written any articles on  
22       noncommercial broadcasting?

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1           A     No, I don't have any articles on  
2     it.

3           Q     Have you conducted any studies on  
4     noncommercial radio stations?

5           A     Studies, no.

6           Q     Do you know the revenues of any  
7     noncommercial radio stations?

8           A     Not offhand.

9           Q     Do you know the revenues of NPR  
10    member stations?

11          A     No, not offhand.

12          Q     Do you have any knowledge of the  
13    FCC rules relating to commercial underwriting  
14    on noncommercial stations?

15          A     I have some knowledge related to  
16    it.

17          Q     Could you describe that?

18          A     Well, my understanding is they're  
19    not to be traditional commercials on air.

20          Q     Okay. Did you review any of the  
21    documents NPR produced in this proceeding?

22          A     Not that NPR produced.

1 Q Did you review any of the  
2 documents that CBI produced?

3 A I don't think so.

4 Q Did you review any documents ever  
5 produced by any of the noncommercial entities  
6 in this proceeding?

7 A I don't think I'm allowed to  
8 review your confidential documents. I think  
9 I'm a witness who's not allowed to do that.  
10 I think that's an objection from your side.  
11 It's not that I would not be interested in  
12 reviewing these documents.

13 Q You didn't sign a certificate  
14 pertaining to the protective order in this  
15 proceeding?

16 A I might have signed a certificate,  
17 but I was told that there was an objection  
18 raised to my being a protected witness and  
19 that I did not have access to those materials.

20 Q So nevertheless, you're not  
21 familiarized with any of the actual documents  
22 produced in this proceeding?

1           A       I'd very much like to be, but no,  
2           they're not accessible to me.

3           Q       And do you know the demographics  
4           of any NPR stations?

5           A       Well,     sure.           I'm     in     the  
6           demographic of some of the stations and it  
7           seems quite obvious and furthermore, in  
8           reading some of the materials, for example,  
9           underwriting materials and so forth.

10          Q       Mr. Griffin, didn't you say during  
11          your deposition when asked "have you ever seen  
12          any demographics of any NPR stations or their  
13          listening audience?" and you said "no, none  
14          that I recall at the moment."

15          A       Right, I didn't recall any at that  
16          moment.

17          Q       And do you recall any now?

18          A       Sure.

19          Q       Have     you     done     something     to  
20          familiarize yourself to remember that?

21          A       I reviewed my exhibits.

22          Q       And what specific study or data



1 discussing the composition of public radio's  
2 audience have you reviewed?

3 A For example, WAMU has some  
4 underwriting materials that highlight their  
5 demographic. NPR has a digital blueprint for  
6 its future. Those are included in my  
7 exhibits.

8 MR. TAYLOR: Your Honor, at this  
9 time I appreciate his responses to both Mr.  
10 Handzo and me. I would remind the Board that,  
11 in fact, this information wasn't presented to  
12 us in his rebuttal statement or his direct  
13 testimony and under the regulations, parties  
14 do have a responsibility to proffer the  
15 qualifications or résumé of the individual  
16 witnesses and to that end, I think that a  
17 significant amount of surprise that we have  
18 before us for the first time learning of Mr.  
19 Griffin's experience with noncommercial  
20 broadcasting.

21 CHIEF JUDGE SLEDGE: We will  
22 recess for about three or four minutes.

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1 (Off the record.)

2 CHIEF JUDGE SLEDGE: Thank you.  
3 We'll come back to order.

4 After consideration of the Board,  
5 our questions, it's not at all clear to the  
6 Board what the answer is on Mr. Griffin's  
7 expertise in noncommercial and we'll defer  
8 that ruling until a specific question is  
9 raised on requiring an expert opinion.

10 MR. HANDZO: Very well. Thank  
11 you.

12 BY MR. HANDZO:

13 Q Mr. Griffin, you have a notebook  
14 in front of you?

15 A I do.

16 Q Let me just ask you to take a look  
17 at the first item in there and identify that  
18 for us, please?

19 A I wrote this. This is my written  
20 rebuttal testimony.

21 Q And is that your signature at the  
22 end?

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1 A Yes, it is.

2 Q Now on page 2 of your written  
3 testimony, Mr. Griffin, you have a heading  
4 there that says "digital convergence  
5 stimulates webcasting." Do you see that?

6 A Yes, I do.

7 Q Can you summarize for us what the  
8 point you were trying to make in that section?

9 A Well, to summarize it, there are -  
10 - there's an audience and there are many  
11 different forms of media and companies that  
12 are going after it and there's a convergence  
13 in their interests in the sense that even the  
14 smallest, what you would use to call a  
15 broadcaster now can webcast and reach the  
16 largest global audience, as an example, and  
17 compete with the largest digital media  
18 companies, for example, Microsoft, AOL, Yahoo,  
19 Clear Channel, faces competition from say a  
20 noncommercial broadcaster, faces competition  
21 from someone who starts a business.

22 MR. TAYLOR: I object on the

1 grounds that Mr. Griffin purports to represent  
2 what a noncommercial broadcaster is thinking  
3 and that they are, in fact, competing with any  
4 other media company. I don't think that he is  
5 qualified to opine on what they may, in fact,  
6 have in their minds with respect to who their  
7 competition is.

8 CHIEF JUDGE SLEDGE: Overruled.  
9 That's not an expert question. That's a  
10 matter of fact known to the general public.

11 BY MR. HANDZO:

12 Q Now Mr. Griffin, just so we're  
13 clear, when you use the phrase digital  
14 convergence, what do you mean?

15 A What I mean is that where  
16 previously we might have separated the  
17 interest of these many companies, based on,  
18 for example, geography, for example, the small  
19 noncommercial radio station with which I was  
20 involved had a 10 watt transmitter. And so  
21 our interests were those who could hear a 10  
22 watt transmitter, meaning our small community.

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1                   When that station moves to the  
2 web, it can reach a much larger community.  
3 That would be an example of a converged  
4 interest, instead of focusing on a very small  
5 group, now that station could go after a much  
6 larger group that might previously have only  
7 been available to those who were exclusively  
8 say webcasters like Microsoft, AOL, Yahoo,  
9 could offer their content to a global  
10 audience, whereas this little radio station  
11 might not have been able to do it in the past.  
12 Now they can. And so their interests have  
13 converged upon a global audience.

14               Q     So if I'm understanding you  
15 correctly, there's now a sort of digital or  
16 global audience out there that everybody gets  
17 to compete for?

18               A     Yes. That's right. And their  
19 interests have converged to reach all of these  
20 people.

21               Q     And the folks who are competing  
22 for that audience would include traditional

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1 internet-only webcasters?

2 A It would include internet-only  
3 webcasters. It would include simulcasters.  
4 It really, to be honest, it could include a  
5 couple of 14-year-olds in a garage who decided  
6 they wanted to go after that same audience and  
7 I'm not pulling that out of old cloth. I mean  
8 those are precisely some of the companies you  
9 have to compete with today.

10 Q What about noncommercial stations?

11 A Noncommercial stations reach out  
12 to the same audience. Their signal is  
13 available. They seek sponsorships, regardless  
14 of geography. They are reaching out to the  
15 same audience.

16 Q Now --

17 MR. TAYLOR: Again, Your Honor, we  
18 do know that, in fact, Mr. Griffin has at one  
19 time in the past, in the far distant past,  
20 worked for a noncommercial station. He has  
21 discussed clearly that his clients today are  
22 not noncommercial stations and he just

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1 proffered a significant amount of what  
2 noncommercial broadcasters are engaging in as  
3 far as competition, as far as what their  
4 business models may or may not be.

5 CHIEF JUDGE SLEDGE: The question  
6 of whether a noncommercial station is reaching  
7 the same audience or reaching for the same  
8 audience is again not an expert opinion. That  
9 is something that everyone listening to  
10 streaming or radio would observe. Objection  
11 overruled.

12 BY MR. HANDZO:

13 Q Mr. Griffin, of the different  
14 groups that you just talked about, internet-  
15 only webcasters and broadcast simulcasters and  
16 noncommercial, let me focus your attention for  
17 the next set of questions on the broadcast  
18 simulcasters, okay?

19 A Yes.

20 Q With respect to that group, what  
21 do you see them doing that suggests that their  
22 business model is converging with that of the

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1 traditional internet-only webcasters?

2 A Well, I mean the first example  
3 would be that their webcasting as opposed to  
4 purely being a broadcaster and so that brings  
5 them into roughly the same domain.

6 They are now seeking sponsorships  
7 from many of the same places that go out and  
8 get advertising and sponsorships. For  
9 example, Clear Channel has signed up with  
10 Ronning Lipset which traditionally represented  
11 webcasters, now includes a broadcast  
12 simulcaster. That would be an example of  
13 employing those same means for reaching out  
14 for money.

15 Q Do you see the broadcasters trying  
16 to grow their on-line audience?

17 A Without question, yes. They are  
18 trying to grow their on-line audience,  
19 significantly so. They're advertising for on-  
20 line audience, telling people the advantages  
21 of listening to the station on line, for  
22 example, would be something they're doing with

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1       their advertising.     And they're spending  
2       significant sums to advertise to get that  
3       point across to the public.

4               Q     I think you mentioned in your  
5       testimony some of that advertising. Is there  
6       television advertising included in that?

7               A     Sure. That would be an example,  
8       would be advertising on television and  
9       pointing out that you can listen to the  
10      station at work, which the broadcast signal  
11      might not be able to reach. Many people work  
12      in buildings where a terrestrial broadcast  
13      signal does not reach and this advantages the  
14      webcast delivery of the content because it can  
15      often reach inside that building, inside the  
16      steel and the bricks.

17              Q     Have you actually seen  
18      broadcasters who are advertising on television  
19      their webcasting capability?

20              A     Oh, yes. And not only in the  
21      Washington area, but in others.

22              Q     But do you know what -- let me

1 withdraw that question.

2 MR. HANDZO: Your Honor, we do  
3 have an example of that ad. I'm having  
4 technical difficulties at the moment, so I'll  
5 just play that at the end if we can.

6 BY MR. HANDZO:

7 Q Do you know which broadcasting  
8 companies run television ads for their  
9 webcasting?

10 A I seem to recall WASH runs some  
11 ads, and KOIT runs some ads like this. They  
12 are examples.

13 Q Now in terms of the number of  
14 channels that broadcasters are streaming, are  
15 you seeing any changes there?

16 A Well, yes. They'd like to be able  
17 to offer more channels and niche channels in  
18 particular. And so they're beginning to use  
19 webcasting to experiment, both at offering new  
20 channels and in keeping old channels alive  
21 that might otherwise have died.

22 I think probably I could

1 characterize that as three kinds of content  
2 they are using the web for, which would be  
3 things that would otherwise have disappeared,  
4 new things they haven't yet fully tested or  
5 that they want to see how it is going. And  
6 thirdly, unusual things that might not  
7 otherwise lend themselves to broadcast.

8 Q So is it necessarily the case  
9 today that a broadcaster is simply  
10 rebroadcasting its terrestrial single over the  
11 internet?

12 A To be sure, they are not. I mean,  
13 of course, there may be some that are doing  
14 just that, but those who would be doing that  
15 I think would be atypical in my experience.

16 Q Does that start to make them look  
17 more like internet-only webcasters?

18 A It converges their interests. I  
19 mean, the key here is that that is where the  
20 growth is. So that is why they are moving  
21 into this area. Multiple singles suggests  
22 increasing audience, the ability to reach out

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1 beyond one's transmitter, again, is growth.  
2 And the market, which owns these companies,  
3 the public markets want growth. And so growth  
4 it is that they get in using this new medium.

5 Q And do you understand the term  
6 side channels?

7 A Sure.

8 Q What is side channel?

9 A Well, a side channel could be used  
10 in several different ways. If you have a  
11 primary transmitter that now has an HD  
12 capability, you can add additional channels to  
13 your broadcast signal. And likewise, you put  
14 your primary single on the web, you can add  
15 additional channels to your primary channel.

16 So let's say someone is accustomed  
17 to hearing you on the radio, through the radio  
18 in the car or in the home or whatever. And  
19 they come to your website, they could find  
20 that you have more than just that signal  
21 available for them to listen to. On the web,  
22 they could listen a very niched music genre,

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1 or something different than you would  
2 otherwise hear and in multiple ways.

3 Q And you've already touched on this  
4 to some degree, but when webcast simulcasters  
5 offer side channels over the web with  
6 different programming, why are they doing  
7 that? What's the advantage?

8 A Well, again, I think there are  
9 three primary reasons that are there. That  
10 is, to keep content that might otherwise go  
11 away alive. I'll illustrate that by pointing  
12 out that WHFS was a very popular radio station  
13 in the Washington market, but its audience was  
14 decidedly niche. Again, not unprofitable, but  
15 niche, you know. It was a group that  
16 supported concerts and other profitable  
17 affairs for the station, but it became more  
18 attractive to switch that transmitter to  
19 broadcast an Hispanic genre that's now called  
20 El Zol. But the company didn't want to leave  
21 the profits behind that came from the concerts  
22 and from the sponsors for that station. And

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1 so they kept that station alive on the  
2 internet.

3 Another example would be trying a  
4 new station that you hadn't otherwise had,  
5 that you think well, maybe this will work.  
6 And so you come up with a genre or a niche and  
7 you bring that station on line and see what  
8 kind of an audience it attracts.

9 And of course, there might be  
10 unusual content that you could not otherwise  
11 try out. And so you will try it out on your  
12 webcast, with the thought that perhaps later  
13 you will move it to one of your transmitters  
14 or one of your side channels on one of your HD  
15 transmitters.

16 Q Are you seeing any changes with  
17 respect to the programming by broadcasters  
18 that makes them look more like the internet-  
19 only webcasters?

20 A Sure, they are in many cases  
21 experimenting in ways that they would not have  
22 previously and trying new approaches to how

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1 many advertisements they take in. In some  
2 cases, taking in no advertisements at the  
3 beginning in order to grow the audience and to  
4 get the ball rolling. So changes in  
5 monitorization, changes in programming, I've  
6 seen both.

7 Q Are you familiar with a type of  
8 programming called Jack?

9 A Oh, sure. I mean, that's a format  
10 that was evolved and adopted largely as an  
11 attempt to retain the audience that the iPod  
12 is seen as taking away from broadcast.

13 Q Tell us what Jack programming is?

14 A Well, Jack is a generic or it's a  
15 brand name, rather. It's not a generic,  
16 because the company that offers the Jack logo  
17 and name and programming format defends it as  
18 vigorously as it can. So they call it Jack.  
19 And it refers to a kind of programming that I  
20 think would be fair to characterize as an iPod  
21 on shuffle. Other people call it a train  
22 wreck of music formats, but it's the notion

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1 that you might hear U2 and then hear Tony  
2 Bennett or Frank Sinatra. It replicates some  
3 of the experience you might get if you had an  
4 iPod and put it on shuffle. It actually was  
5 quite successful in drawing increased numbers  
6 of the stations that have used it. So more  
7 stations have adopted it.

8 Q And does Jack programming have  
9 much in the way of DJ talk?

10 A Less DJ. Much less DJ. Again,  
11 approximating an iPod on shuffle is the  
12 general notion of going to a Jack format for  
13 a station.

14 Q And you've described it as  
15 approximating an iPod on shuffle. Does it  
16 also approximate what the traditional  
17 internet-only webcasters do?

18 A It gets closer to what an  
19 internet- only webcaster does. Yes.

20 CHIEF JUDGE SLEDGE: Mr. Handzo,  
21 iPod on shuffle means nothing to me.

22 BY MR. HANDZO:



1           Q     Let me ask Mr. Griffin to explain  
2 first, what an iPod is and then what being on  
3 shuffle means.

4           A     iPod being a small bit-bucket or a  
5 hard drive or a flash memory. They make them  
6 in each kind -- flash memory, hard drive. It  
7 holds digital music, plays it back through a  
8 pair of headphones or a speaker or through  
9 your car or through your home stereo. And  
10 because it's organized as data on a hard drive  
11 or in memory, as opposed to different discs  
12 and so forth, one of its advantages is that  
13 you can put it into shuffle mode, meaning you  
14 pick the songs at random. The songs are  
15 chosen at random from the songs that you put  
16 into its memory.

17          Q     Let me do this in a little less  
18 technical fashion.

19          A     Sure.

20          Q     Is it right that an iPod is a  
21 small, handheld device that you can download  
22 music to?

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1           A     Right, some of them are smaller  
2           than your hand, by the way. They're so small  
3           that they've gotten down to several inches  
4           across and can hold, say, 1,000 songs.

5           Q     Okay, so you can download 1,000  
6           songs to it to replay?

7           A     That's right.

8           Q     Okay, and carry it around with you  
9           wherever you go?

10          A     That's right.

11          Q     And they're fairly popular?

12          A     I would say it's the hottest item  
13          right now for this holiday season is the  
14          newest, tiniest iPod. So it's not just  
15          popular, it's considered one of the hottest  
16          items and has propelled Apple's website into  
17          the top 10 of commerce sites.

18          Q     Okay, now if I own an iPod and I  
19          put it on shuffle. What does that mean?

20          A     The iPod will choose your songs.  
21          iPod not having any judgment or choice, it's  
22          purely random when it does that. So again,

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1 any song could be played before or after any  
2 other song.

3 Q So if I've got 1,000 songs in my  
4 iPod, instead of playing them in order 1, 2,  
5 3, it will just randomly select from my 1,000?

6 A That's right. That's the idea.

7 MR. HANDZO: Does that help,  
8 Judge?

9 CHIEF JUDGE SLEDGE: Yes, sir.  
10 Hard to imagine somebody recording on an iPod  
11 having much variety among their songs, though.  
12 I understand what he says.

13 MR. HANDZO: You'd be surprised.

14 CHIEF JUDGE SLEDGE: I'm  
15 surprised.

16 (Laughter.)

17 That's an understatement.

18 BY MR. HANDZO:

19 Q One of the other things that you  
20 mentioned, Mr. Griffin, in terms of the  
21 convergence between broadcasters and internet-  
22 only webcasters is the way that they sell

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1 advertising. Can you just elaborate on that  
2 a little bit?

3 A Well, internet-only webcasters for  
4 awhile were working with Ronning Lipset, but  
5 now broadcasters have joined them in pooling  
6 their, what we'll call, inventory, their  
7 advertising inventory to be sold together with  
8 the others. It's, I think, a recognition that  
9 it's largely the same audience of sponsors and  
10 advertisers that they're going after. I think  
11 also very importantly is that they want to be  
12 part and parcel in developing new approaches  
13 to narrowcasting that advertising in the  
14 future.

15 Q Just so we keep our terms clear,  
16 what do you mean by narrowcasting?

17 A The idea being that when you're a  
18 broadcaster, when you're using your  
19 transmitter, everyone hears the same ad at the  
20 same time and the same content. But when you  
21 are webcasting, because you are delivering an  
22 individual stream to each listener, there is

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1 the possibility, it's not just a possibility,  
2 it's the reality that you can now deliver  
3 something different.

4 And so, for example, we would say  
5 Pandora is a narrowcaster, because they  
6 deliver a different signal to each listener.  
7 The notion that advertising could similarly be  
8 targeted is considered a prime way to raise  
9 its value.

10 Q Do you see the broadcasters  
11 increasing the number of stations or channels  
12 that they stream?

13 A Yes. Not only are more  
14 broadcasters going on line and streaming,  
15 that's been a decision that's been made by big  
16 companies, some of which whom I've been  
17 associated, but they are adding additional  
18 channels, as we'll call them, not building  
19 stations. They're not a transmitter and  
20 antenna and new license and so forth. But if  
21 you've got a new programming idea, it's very  
22 easy to try and put it on line.

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1           Q     I think you have some statistics  
2     in your testimony about the degree to which  
3     some of the companies have increased their  
4     streaming and you refer to Clear Channel, for  
5     example, and I won't give you a memory test.  
6     Do you recall what the numbers are?

7           A     Over 400 percent as regards Clear  
8     Channel is my recollection.

9           Q     In terms of the amount of  
10    streaming that they're doing?

11          A     Yes, that's right.

12          Q     And over 400 percent during what  
13    time, do you recall?

14          A     I don't recall the time period,  
15    exactly, to be honest with you, but it's a  
16    relatively short period of time.

17          Q     Let me just refresh your  
18    recollection. Why don't you turn to page 8 of  
19    your testimony?

20                   (Pause.)

21                  And if you look down there at the  
22    bottom paragraph, do you see that?

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1           A       Let me just look here on page 8.  
2           Four hundred twenty-one percent between April  
3           2005 and May 2006, or bringing it to near  
4           parity with AOL Radio.

5           Q       And we're talking about Clear  
6           Channel here?

7           A       That's right.

8           Q       Let me ask you to take a look at  
9           Exhibit 224 attached to your statement.

10          A       I have it in front of me.

11          Q       And again --

12                   CHIEF JUDGE SLEDGE:   Excuse me,  
13           Mr. Handzo, I haven't found that.

14                   MR. HANDZO:   My apologies, Your  
15           Honor.   It is -- there are a series of  
16           indented paragraphs at the bottom of page  
17           eight and in the very last paragraph you see  
18           the -- it says "in terms of format"?

19                   CHIEF JUDGE SLEDGE:   Thank you.   I  
20           just overlooked it.

21                   BY MR. HANDZO:

22          Q       Mr. Griffin, looking at Exhibit

1 224, what is that?

2 A This appears to me to be a press  
3 release that comes from CBS Radio, indicated  
4 that KROC FM which is perhaps one of their  
5 greatest brands is now going on line on  
6 February 6th of 2006.

7 Q And if you look down at the fourth  
8 paragraph.

9 A Yes.

10 Q What does that tell you about what  
11 CBS is doing with respect to its streaming?

12 A It tells me what I already knew,  
13 which is that it's a major priority for CBS  
14 Radio.

15 Q And looking at, I guess, the  
16 paragraph above that?

17 A Yes. It says at this point, when  
18 this press release came out that that brought  
19 their total number of stations to 50 and that  
20 10 of those are exclusively available on the  
21 web.

22 Q And in terms of -- we talked now

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1 about Clear Channel increasing its streaming,  
2 CBS increasing its streaming. Are those two  
3 companies unusual in what they're doing in the  
4 broadcasting area?

5 A No, they're not unique.

6 Q Are other broadcasters doing the  
7 same thing?

8 A ABC is there. Many other  
9 stations. And I hear regularly from  
10 broadcasters who want to do just the same  
11 thing that they're doing.

12 Q Now from your perspective as an  
13 observer of this industry, what are the  
14 benefits that the broadcasters get by  
15 increasing their streaming operations and  
16 advertising and so on?

17 A It grows their potential audience,  
18 grows their sponsor base. These are critical  
19 to them.

20 Q And why is that growth critical?

21 A Their revenues depend upon it.  
22 Their duty to their shareholders is to be

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1 profitable, of course, and the public markets  
2 being many of their shareholders, it's  
3 important for them not just to see profit, but  
4 to see growth. And this new market and bigger  
5 markets and especially digital markets  
6 represent growth to these companies. And  
7 that's very important to them.

8 Q Is this just an issue of growing  
9 the revenues or are there also issues relating  
10 to who they're competing with?

11 A Well, I mean those two go hand in  
12 hand. I mean when you can compete with more  
13 people, you have a greater potential for  
14 revenue because you can get their sponsors  
15 too. So they see, for example, traditional  
16 internet-only webcasters as gleaning revenues  
17 that they'd like to get. They see  
18 noncommercial broadcasters and webcasters  
19 going after money that they themselves would  
20 like to claim.

21 Q And is the converse also true, not  
22 only might you get revenues that your

1 competitor is getting, but you might lose  
2 revenues to your competitors if you don't get  
3 in the space?

4 A Oh, to be sure. I mean that is  
5 what they have been seeing is that all of  
6 their money is up for grabs to people that  
7 they may have never met and they didn't even  
8 know were in their market. But all of a  
9 sudden, they are because there is what we call  
10 a death of distance on the Internet, distances  
11 far less relevant when you're on the Internet.

12 Q Does webcasting their signal offer  
13 any benefits to broadcasters in terms of what  
14 audience they can reach and where they can  
15 reach them?

16 A Well, sure. It says they can  
17 reach them anywhere that you can get digits.

18 Q And is that the case with a  
19 terrestrial signal?

20 A Well, certainly not. A  
21 terrestrial signal is limited and partly  
22 that's the reason we have an FCC that sort of

1 figures out these divisions and so forth and  
2 allocates transmitter power and the times that  
3 that transmitter can run, for example, night  
4 versus day, changes propagation of the signal  
5 into more and different markets. And so the  
6 FCC regulates that. But on the net, there is  
7 not FCC to regulate it and that's largely  
8 unnecessary because there is no resource  
9 contention and you can reach out and go after  
10 any audience you want in the world, as long as  
11 they get digits.

12 Q Leaving aside the sort of  
13 geographic limitations of a broadcast signal  
14 in terms of the whole area it can reach, are  
15 there places where a broadcast signal tends  
16 not to penetrate?

17 A Sure. I mean within the  
18 geographic area of your transmitter, you can't  
19 reach past places that block radio signals.  
20 Concrete, steel, amongst others, these have  
21 tendency to diminish broadcast signals  
22 dramatically to the point where they cannot be

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1 heard.

2 Q So what about people listening at  
3 work?

4 A People listening at work are a  
5 prime audience for webcasters because again,  
6 they cannot listen to their AM-FM radio if  
7 they are within a barrier, a steel or a  
8 concrete barrier that blocks the transmission.  
9 That happens frequently.

10 It happens so frequently that  
11 broadcasters will advertise on the television  
12 that uniquely you can hear us at work.

13 Q Is that an audience that  
14 broadcasters are trying to reach through  
15 webcasting?

16 A Oh yes. I mean it's not just me  
17 saying that. They say that. I mean I quote  
18 in my testimony the CFO at CBS Radio saying  
19 that this is a very important part of our  
20 strategy is reaching people at work. So it's  
21 not just me saying it. They say it too and  
22 they're clear about that.

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1 Q Again, not to have a memory test  
2 here, but do you also recall comments by Evan  
3 Harrison from Clear Channel?

4 A Evan Harrison has been even bolder  
5 than a CFO from CBS would be in saying that  
6 you're not in the game if you're not  
7 streaming. That as far as they're concerned  
8 here, you're not even participating in the  
9 same business that they are. I would add  
10 they're not just a webcaster or a broadcaster.  
11 They're the biggest broadcaster by far.

12 Q Let me turn your attention not to  
13 noncommercial broadcasters and webcasters. On  
14 page 12 of your testimony, if you can flip to  
15 that --

16 CHIEF JUDGE SLEDGE: Mr. Taylor,  
17 we will wait for the question.

18 BY MR. HANDZO:

19 Q You will see that in the first  
20 sentence under Section C you say  
21 "noncommercial webcasters are also acting  
22 increasingly like their commercial brethren."

1 Do you see that?

2 A Yes.

3 Q Now with respect to that subject,  
4 in terms of how they raise money or -- well,  
5 how they raise money, do you see similarities  
6 there?

7 CHIEF JUDGE SLEDGE: Mr. Taylor?

8 MR. TAYLOR: Your Honor, if I may,  
9 I object to this witness testifying with  
10 respect to the noncommercial stations and  
11 their revenues.

12 I mean quite simply he's not a  
13 fact witness. He has not been proffered by  
14 NPR or any of the noncommercial stations. For  
15 that matter, he hasn't even been proffered by  
16 a station that considers itself in competition  
17 with NPR or any of the noncom.

18 Instead, he would simply give the  
19 Court his opinion, based on observations that  
20 he has made. That opinion, anybody in this  
21 courtroom could agree with or disagree with.  
22 So in the absence of some factual basis or

1 some basis as an expert, he is simply, I  
2 believe, unable to tell this Court what NPR's  
3 revenues are, how NPR may be engaged in  
4 earning those revenues, how NPR or its  
5 audience, how NPR plans to reach of its  
6 audiences, or for that matter how they plan on  
7 using revenues to fund their station  
8 operations.

9 So again, I renew my objection. I  
10 apologize that I once again must pop up and  
11 object.

12 CHIEF JUDGE SLEDGE: That  
13 objection is similar to what we've addressed  
14 before and does not address the specific  
15 question and is overruled.

16 The specific question is does  
17 noncommercial stations raise revenues similar  
18 to broadcasters and that does not call for an  
19 expert opinion. And one little thing further  
20 about how he's testifying, the best I can tell  
21 he's given two sentences so far of expert  
22 testimony. Everything else he has said has



1       been as a fact witness. And so we'll see if  
2       and when he gets to a point of giving an  
3       expert opinion, we'll deal with his expertise.

4                   Mr. Joseph?

5                   MR. JOSEPH:       Your Honor, I  
6       understood Mr. Taylor's objection to relate to  
7       expert opinion. I'll object on those grounds  
8       of lack of foundation.

9                   CHIEF JUDGE SLEDGE: Overruled.

10                  BY MR. HANDZO:

11                 Q       Mr. Griffin, do you see  
12       noncommercial stations raising money in the  
13       same way that commercial stations do?

14                 A       Yes, I do.

15                 Q       And describe how they go about  
16       that?

17                 A       Well, an example would be that I  
18       regularly hear from them in raising revenues  
19       from me. And so that's one place where I can  
20       speak to it quite directly. I hear from those  
21       who wish for me to sponsor shows or activities  
22       at the station. And in fact, it raises an

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1 interesting example for here because while  
 2 that case KCRW in Southern California when my  
 3 business was in Southern California and most  
 4 of my clients, many of them, more of them were  
 5 in Southern California, now I've moved across  
 6 the country. KCRW still solicits me to  
 7 purchase sponsorships from them because as  
 8 they put it well, your move to Washington  
 9 really doesn't matter to us. Our audience is  
 10 in Washington too. That would be just one  
 11 example I would cite off the top of my head.

12 Q Before you move on, let me just --

13 MR. TAYLOR: Your Honor, I object.  
 14 I move to strike the witness' testimony there.  
 15 None of that is in his testimony. Him -- KCRW  
 16 soliciting him to this day.

17 CHIEF JUDGE SLEDGE: Mr. Handzo?

18 MR. HANDZO: Your Honor, he is  
 19 talking generally about how they raise money  
 20 and sell sponsorships. I frankly don't recall  
 21 whether he specifically said that they  
 22 solicited him, but certainly the subject

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1 matter of how they raised revenue by selling  
2 sponsorships is covered in a number of places  
3 in his testimony.

4 (Pause.)

5 MR. HANDZO: On page 15, for  
6 example, he says "Further, NPR sells its  
7 audiences to underwriters and sponsors the  
8 same way the commercial webcasters do to their  
9 advertisers."

10 (Pause.)

11 CHIEF JUDGE SLEDGE: Overruled.

12 THE WITNESS: Can I go on?

13 MR. HANDZO: Yes.

14 CHIEF JUDGE SLEDGE: No, you  
15 finish your --

16 BY MR. HANDZO:

17 Q Okay, let me come back to your  
18 answer, with respect to the purchases that  
19 have been to you to buy a sponsorship, what is  
20 it that -- I take it that what you would do as  
21 your part of the bargain is you would give  
22 them money?

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1 A Yes, that's right.

2 Q And what would you get in return?

3 A Mention on the air or a billboard  
4 at a concert or they would arrange to have the  
5 name of my company or what I wanted promoted  
6 to be used in their media that they present.

7 Q And is there a specific amount  
8 that you would have to give them in order to  
9 get that kind of mention?

10 A As much as possible. I mean to  
11 get more mentions and so forth, I mean that's  
12 one example I have from personal experience.  
13 It could go further with other examples.

14 Q Well, before we do that, let me  
15 ask you to take a look at Exhibit 214 to your  
16 testimony.

17 A I see it.

18 Q And tell us, if you would, what  
19 that is?

20 A This is from WXPB which is a  
21 public station in Philadelphia. It's from  
22 their website.

1 Q And what are they doing on this  
2 webpage?

3 A They're laying out the demographic  
4 that they believe their station has. In other  
5 words, here's how we characterize our  
6 listeners. They're more affluent. Their age  
7 is young and they're well educated.

8 Q Is that information of interest to  
9 advertisers or sponsors?

10 A That's precisely one of the things  
11 that an advertiser or a sponsor would be  
12 looking for.

13 Q And is that why this information  
14 is here?

15 A Sure.

16 Q Now you notice there's a bullet  
17 point where it says "Public radio offers  
18 unique benefits"?

19 A Yes.

20 Q And then it says "Eighty-eight  
21 percent of public radio listeners have a  
22 higher opinion of a company when they find out

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1 it supports public radio"?

2 A Yes. They're making it clear that  
3 when they hear your name from us, that it will  
4 mean more than it would say from someone else.

5 Q And the next bullet point, "Eighty  
6 percent believe that when price and quality  
7 are equal, they prefer to buy products from  
8 companies, businesses and organizations that  
9 support public radio?"

10 A Same point. They'll think more  
11 favorably of you if you give us your money  
12 than if you gave it to our competitor.

13 Q I take it this is basically a  
14 pitch to companies that they should buy  
15 sponsorships or underwritings to get their  
16 name associated with public radio?

17 MR. TAYLOR: Your Honor?

18 THE WITNESS: Yes, that's right.

19 CHIEF JUDGE SLEDGE: Mr. Taylor?

20 MR. TAYLOR: I stood up to object  
21 to the point that he that with respect to this  
22 exhibit that he was interpreting what NPR

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1 sought to communicate. I mean if he wants to  
2 discuss the document or read the document  
3 that's fine, but to the extent that he's going  
4 to offer an opinion for what, in fact, is  
5 communicated by that point or what NPR  
6 intended to communicate, it's outside of his  
7 statement and moreover, it's again something  
8 that I think an expert could tell us, but this  
9 witness can't tell us, in fact, what they  
10 intended to communicate.

11 CHIEF JUDGE SLEDGE: The objection  
12 characterizes the testimony broader than it  
13 is. The objection is overruled. The witness  
14 has said that the -- has paraphrased what the  
15 exhibit shows and then has given the expert  
16 opinion that this is important to advertisers.  
17 And that is not within the context of your  
18 objection to expert opinion as to  
19 noncommercial stations.

20 MR. TAYLOR: Thank you, Your  
21 Honor.

22 BY MR. HANDZO:

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1 Q Mr. Griffin, along the same lines,  
2 can you take a look at Exhibit 202 of your  
3 testimony?

4 A Yes, I'm looking at it now.

5 Q What is that?

6 A American University here in  
7 Washington has a noncommercial station, WAMU.  
8 And this is a corporate underwriting kit from  
9 WAMU, indicating the programming that WAMU  
10 offers and the audience to which they offer  
11 it, both as to geography and number and  
12 characteristics of that audience and along  
13 with some testimonials from that audience  
14 about the effectiveness of advertising or  
15 sponsoring shows on WAMU.

16 Q So again, would this be  
17 information that's of interest to an  
18 advertiser?

19 A Well, sure, that's why it's called  
20 an underwriting kit.

21 Q Mr. Griffin, at the outside of  
22 your testimony I asked you some questions

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1 about what you do to sort of follow the  
2 activities of noncommercial stations and one  
3 of the things you said was you actually look  
4 at their employment ads, who they're hiring?

5 A Sure, it's one of the ways that I  
6 figure out what companies are doing.

7 Q And have you seen advertising by  
8 NPR or other noncommercial stations to hire  
9 people to pursue these kinds of advertising  
10 revenues?

11 A Sure, NPR conveniently aggregates  
12 those ads on its website.

13 Q Let's take a look at one of those  
14 aggregation of ads. I think it's Exhibit 234  
15 to your testimony.

16 A Let me find that, 234. Okay, I  
17 have that.

18 Q Why don't you turn, if you would,  
19 to page 12 of that exhibit?

20 A Yes.

21 Q And if you look at the ad for a  
22 manager of corporate sponsorship, do you see

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1 that?

2 A Yes, I do.

3 Q What do you understand the nature  
4 of the job that they're advertising for there  
5 to be?

6 A Somebody to get money from  
7 companies for NPR.

8 Q Any difference that you can see  
9 between the qualifications they want for that  
10 job and what a commercial station would want  
11 for somebody to bring in advertising revenues?

12 A No. In fact, they make it clear  
13 in the ad that that's what they want is  
14 somebody with experience doing that, not  
15 somebody who might be able to do that, but  
16 someone, as it says here with a proven track  
17 record of doing that.

18 Q So somebody with experience on the  
19 commercial side?

20 A Yes.

21 Q Have you seen other similar ads  
22 like this for NPR?

1           A       Yes, and in fact, this ad is  
2       couched in the number of similar ads, for  
3       example, you know the ad that follows is for  
4       a national representative for corporate  
5       sponsorship.

6           Q       Is that the one that says you need  
7       a minimum five years' experience in national  
8       media sales and national media planning?

9           A       Yes, it's clear. It's sales and  
10      advertising agencies.

11          Q       Again, any difference between that  
12      and what a commercial station would want?

13          A       In fact, I think there's no  
14      difference. They want someone who did do  
15      that.

16          Q       Now with respect to raising money  
17      by selling sponsorships or underwriting or  
18      advertising or whatever you want to call it,  
19      do you have an understanding of how music fits  
20      in for noncommercial stations as part of that  
21      effort?

22          A       Sure, it draws the crowd.

1 Q How do you know that?

2 A Well, they play a lot of music in  
3 order to grow the number of people who are  
4 listening and my conversations, they say, you  
5 know, we want the right mix of music. KCRW,  
6 in particular, prides itself on using its  
7 unique music selections in order to draw the  
8 crowd that it draws. I think that's one good  
9 example. I mean the Philadelphia station  
10 clearly picked up a popular commercial station  
11 that had fallen by the wayside and adopted it  
12 as its own side channel. So it's not just  
13 what I think about them. I think their own  
14 actions support what I'm saying. They use  
15 music to draw a crowd and if they can, more  
16 signals of music.

17 Q Further to that point --

18 CHIEF JUDGE SLEDGE: Just a  
19 moment, Mr. Taylor?

20 MR. TAYLOR: Maybe Mr. Handzo can  
21 help me out, but I don't know where Mr.  
22 Griffin has anywhere that they use music to

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1 draw a crowd in his testimony.

2 CHIEF JUDGE SLEDGE: Mr. Handzo,  
3 it seems that the testimony of Mr. Griffin is  
4 giving right now sounds more like direct  
5 testimony than his rebuttal testimony. I  
6 trust that you're going to move shortly to  
7 rebuttal testimony?

8 MR. HANDZO: I actually only have  
9 a few more questions along these lines, Your  
10 Honor.

11 CHIEF JUDGE SLEDGE: Overruled.

12 MR. HANDZO: Your Honor, with  
13 respect to using music as part of the way to  
14 draw a crowd, I would direct the Court's  
15 attention to page 16 of Mr. Griffin's  
16 testimony.

17 And there is talks about NPR's  
18 initiative to grow its audience, one of the  
19 three vital alternatives being a multi-genre  
20 digital music service.

21 It also says "NPR's digital  
22 distribution efforts including music are

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1 central to its fundraising prospects." It  
2 goes on for another couple of paragraphs.

3 (Pause.)

4 CHIEF JUDGE SLEDGE: Overruled.

5 BY MR. HANDZO:

6 Q Mr. Griffin, since we're at that  
7 part of your testimony, let me ask you to turn  
8 to NPR's Blueprint for Growth which I believe  
9 Exhibit 231 to your testimony.

10 A I have it in front of me.

11 Q And looking in particular at let's  
12 say the third page of this document, bottom  
13 paragraph, does that support your view that  
14 public radio stations like NPR use music to  
15 draw the crowd?

16 A Sure. It's very clear. Not just  
17 the crowd, but the same crowd that others are  
18 attempting to reach.

19 Q Let me ask you to flip a few more  
20 pages. I think it's the sixth page. Sixth  
21 page where the NPR's "Blueprint for Growth"  
22 describes a new music service. Do you see

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1 that?

2 A I do. The last paragraph on the  
3 page.

4 Q And again, does that support your  
5 view that they're using music to draw the  
6 crowd?

7 A Well, sure. They call it the  
8 poster child. So I think use of the word  
9 "poster" would indicate draw a crowd.

10 Q Do you know if NPR, in fact, has  
11 plans to offer a new digital music service?

12 A I believe they do. I don't  
13 personally have direct knowledge, but  
14 reviewing these documents, I believe they are.

15 Q Well, when we talked about these  
16 documents, let's talk about one in particular.  
17 Let me ask you to go to Exhibit 212.

18 A Yes.

19 Q Does that --

20 A Sure, it's a press release from  
21 NPR.

22 Q About what?

1           A       Saying they're developing a new  
2 digital music service. That's their claim.

3           Q       And do you see reference there in  
4 the third paragraph to the importance of music  
5 to NPR?

6           A       Sure. They call it a cornerstone.

7           Q       Just one other question on this  
8 topic of public radio stations, Mr. Griffin.  
9 You mentioned earlier that commercial stations  
10 are starting to offer side channels or  
11 additional channels besides their terrestrial  
12 radio program. Do commercial stations do the  
13 same? I'm sorry, noncommercial stations do  
14 the same?

15          A       Yes, in fact, they do. I mean one  
16 of the examples I gave earlier of XPN in  
17 Philadelphia adding Y100, we could similarly  
18 point to KCRW and I believe it has three side  
19 channels in addition to its primary signal.

20          Q       Mr. Griffin, let me turn to a  
21 different topic which is the second part of  
22 your testimony, it discusses wireless

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1 technology?

2 A Yes.

3 Q I have a few questions for you  
4 about that. First question I guess is why  
5 does wireless technology matter to webcasters  
6 or in this case?

7 CHIEF JUDGE SLEDGE: Mr. Joseph?

8 MR. JOSEPH: Your Honor, I think  
9 we were told that they were going to move to  
10 rebuttal testimony. Actually, as I look at  
11 part two of Mr. Griffin's testimony, there's  
12 absolutely nothing that it's rebutting and I  
13 would object to rebuttal testimony on a  
14 subject that isn't rebuttal.

15 CHIEF JUDGE SLEDGE: Mr. Handzo?

16 MR. HANDZO: Your Honor, I think  
17 there was a fair amount of testimony in the  
18 opening case about wireless technology and  
19 whether it's important to webcasters and  
20 whether it's sort of pie in the sky in the  
21 future or whether it's going to come during  
22 the current license term and what it means for

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1 webcasting. I can't cite to you a page and a  
2 line number, but I do believe that there was  
3 testimony about that and the point of this is  
4 simply to address that testimony and to show  
5 this wireless technology is something that has  
6 made advances and is even in the time that  
7 we've been in trial in this case, has made  
8 progress that Mr. Griffin can talk about.

9 JUDGE ROBERTS: Are you saying,  
10 Mr. Handzo that the broadcasters or the  
11 webcasters put the technology question into  
12 evidence in the direct case?

13 MR. HANDZO: I think in the first  
14 instance, we put it into evidence in the case,  
15 but I think in the course of cross  
16 examination, there were questions raised that  
17 I think we are entitled to respond to in  
18 rebuttal.

19 JUDGE ROBERTS: Can you describe  
20 to me generically what those questions are?

21 MR. HANDZO: I think generically  
22 the questions are how soon is wireless

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1 technology coming. I think there were  
2 questions raised about whether it is coming  
3 soon enough to have any impact on this  
4 proceeding. I think there were also questions  
5 raised about whether it matters to webcasting,  
6 what impact it has on it. Does it affect the  
7 finances of the webcasters and therefore what  
8 rate the Board might consider setting in this  
9 case and I think certainly both of those  
10 things came up in cross examination during the  
11 opening phase of the trial.

12 CHIEF JUDGE SLEDGE: Mr. Joseph?

13 MR. JOSEPH: Your Honor, I think  
14 Mr. Handzo is correct when he says that the  
15 issue of wireless transmission is a  
16 SoundExchange argument and a SoundExchange  
17 point in support of their fee proposal. There  
18 may have been cross examination on the  
19 subject, but that doesn't turn the testimony  
20 that's offered here into rebuttal of anything  
21 that the broadcasters or the webcasters put  
22 into evidence.

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1           The parties should have the right  
2       to cross examine a witness that's been  
3       proffered on a subject to test that subject  
4       without thereby opening the door to  
5       essentially the resubmission of a direct case  
6       on rebuttal.

7           Everything that's in here is  
8       material that but for a question perhaps of  
9       timing, may or may not have been available at  
10      the time of their direct case, but it all goes  
11      to the fundamental issue raised in their  
12      direct case. They could have put it in in  
13      their direct case. They could have put it in  
14      in their direct case.

15           CHIEF JUDGE SLEDGE: I'm trying to  
16      remember the three factors that we've  
17      addressed. Does timing play a role in what is  
18      rebuttal?

19           MR. JOSEPH: Is that directed to  
20      me, Your Honor?

21           CHIEF JUDGE SLEDGE: Yes.

22           MR. JOSEPH: Frankly, I'm not sure

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1 which three factors you're referring to when  
2 you say the three factors we've addressed.

3 CHIEF JUDGE SLEDGE: I think  
4 you're right. I'm recollecting the three  
5 factors that we've identified on motions for -  
6 - that are incorrectly called reconsideration  
7 and that's not relevant here.

8 What is the significance then of  
9 your comment of timing as to whether this is  
10 rebuttal?

11 MR. JOSEPH: I was simply arguing,  
12 Your Honor, that the fact that there may have  
13 been -- we may now be what a year later than  
14 when the direct cases were submitted, doesn't  
15 change that which isn't rebuttal into  
16 rebuttal. That was the only significance of  
17 my point.

18 CHIEF JUDGE SLEDGE: All right,  
19 Mr. Taylor?

20 MR. TAYLOR: I would just simply  
21 note that the Public Radio joins the  
22 Broadcasters in the motions and point out that

1 in the section there is absolutely no citation  
2 to or reference to any claim made by any of  
3 the service's witnesses and therefore we  
4 believe that SoundExchange is taking the  
5 opportunity just to amplify their direct case  
6 at this point.

7 CHIEF JUDGE SLEDGE: Mr. Handzo?

8 MR. HANDZO: Your Honor, it seems  
9 to me that what's being advocated here is a  
10 highly cramped notion of what rebuttal is that  
11 I don't think would hold anywhere.

12 As I recall the Board's  
13 regulations, it does not define what rebuttal  
14 is. It simply says you submit a rebuttal  
15 case, but it actually doesn't say anything at  
16 all about particular requirements that have to  
17 be met. So technically, under the  
18 regulations, I certainly don't think there's  
19 any violation here. But I also think that it  
20 is really a far too restricted notion to say  
21 if there are issues that are addressed in the  
22 opening phase, whether they come up in the

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1 direct examination or whether they come up on  
2 cross examination, the notion that you can't  
3 respond to them in the rebuttal case seems to  
4 me to be far too narrow a definition of  
5 rebuttal.

6 Nobody is contesting that these  
7 issues were raised and were discussed and  
8 issues came up in the opening phase. The only  
9 question is who brought them up. That doesn't  
10 seem to me to have anything whatsoever to do  
11 with whether this is proper rebuttal.

12 JUDGE ROBERTS: It's what you're  
13 responding to, I guess, Mr. Handzo, is the  
14 question that I have in my mind. The way I'm  
15 seeing it is that Mr. Griffin made a number of  
16 statements in his direct presentation about  
17 wireless services. Certainly, there was some  
18 cross examination on that. I acknowledge that  
19 probably some of it is well, you know, really  
20 how developed is it and is it really coming,  
21 Mr. Griffin? And now the testimony, some of  
22 it seems to be oh yes, it really is coming,

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1 but at the same time a lot of it does seem to  
2 be a repeat of what was in the direct case.

3 In the interest of moving things  
4 along, we would be interested in hearing  
5 testimony that oh yes, it's really coming and  
6 here's why.

7 MR. HANDZO: Let me put those  
8 questions to the witness, Your Honor. And  
9 I'll move it along.

10 CHIEF JUDGE SLEDGE: All right,  
11 we'll take a 10-minute recess in which we'll  
12 consider the objections.

13 MR. HANDZO: Thank you.

14 (Off the record.)

15 CHIEF JUDGE SLEDGE: After  
16 deliberation and review of the statement in  
17 Section 2, the Court concludes that the  
18 section does not address matters raised by the  
19 Services in their direct cases and the  
20 objections are sustained.

21 Further, the Court exercises its  
22 discretion to be able to solicit evidence and

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1 using that discretion, the Court directs  
2 SoundExchange to proceed with questions,  
3 limited to evidence that has occurred  
4 subsequent to the submission of the direct  
5 written statements.

6 BY MR. HANDZO:

7 Q Mr. Griffin, let's go back to the  
8 subject of wireless technology and I want to  
9 ask you some questions about the growth of  
10 wireless networks. And again, as you've just  
11 heard the Court's ruling, so what I want to  
12 focus you on is the growth of wireless  
13 networks that has occurred since the time that  
14 you submitted your original testimony in this  
15 case back in October a year ago. Okay?

16 A Yes.

17 Q And let me just ask you broadly,  
18 what has happened in terms of the growth of  
19 wireless networks since that time?

20 A Well, there's been a number of  
21 significant developments. I'd say probably  
22 one of the most relevant for this proceeding

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1 is Sprint's announcement that it would be  
2 deploying WiMax significantly throughout the  
3 United States. Coupled, I would add, Ford's  
4 announcement that it would be including an  
5 internet radio in the 2007 Ford F150, I'd say  
6 that was consistent, but a new development.  
7 And their announcement that it would presently  
8 use cellular, but as soon as possible would  
9 use WiMax, so I think those two kind of fit  
10 together.

11 Q Okay. Let me talk about the  
12 Spring announcement first and I don't want to  
13 violate the Board's ruling.

14 MR. HANDZO: Is it helpful to  
15 explain what WiMax is?

16 CHIEF JUDGE SLEDGE: No, that's  
17 covered.

18 MR. HANDZO: Very well.

19 CHIEF JUDGE SLEDGE: Well, I don't  
20 know. In light of the objection.

21 MR. HANDZO: I can do it in two  
22 sentences, Your Honor.

1 CHIEF JUDGE SLEDGE: All right.

2 BY MR. HANDZO:

3 Q Mr. Griffin, just briefly, what is  
4 a WiMax network?

5 A Id' say it's like WiFi which is  
6 short range except WiMax is long range and it  
7 would typically be used over a 10 to 30 mile  
8 radius.

9 Q Do you know how much money Spring  
10 has committed to building out a WiMax network?

11 A In excess of \$1 billion is my  
12 recollection.

13 Q And do you have an understanding  
14 of what the time table is for rolling out that  
15 network?

16 A Over the next year or two.

17 Q And do you also have an  
18 understanding of what impact that has on the  
19 ability to get music wirelessly?

20 A Yes. It's very important to  
21 wireless development because under say, for  
22 example, WiFi would be very short range. And

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1 so while it might enable you to listen  
2 wirelessly around your property, or around a  
3 college campus or in the extreme across a  
4 municipal zone because I think that's an  
5 important development. An example would be  
6 one of my clients, Nokia, has now begun  
7 installing and has succeeded in installing  
8 wireless in New York City parks in Manhattan.  
9 And that wireless will -- because you can't  
10 contain it, it spills over beyond the parks as  
11 well and covers a great deal of Manhattan.

12 WiFi is typically thought of as  
13 short range, but you can have a lot of units  
14 and it can cover a very wide range, but WiMax  
15 is important because it doesn't require you to  
16 put in all of these individual sites. We  
17 typically refer to cellular or even WiFi is a  
18 cellular technology because it deals with a  
19 short range and if you want to cover that --  
20 a broader range, you have to have more units.

21 With WiMax, you do not have to  
22 have a lot more units. You can have one that

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1 covers say a 10 to 30-mile range.

2 Q I take it then that Sprint is  
3 building out a WiMax network that's going to  
4 cover a far greater area than is currently  
5 covered?

6 A Yes. It's intended to do so and  
7 to be able to reach into those areas that  
8 typically had no last mile before, rural areas  
9 would be an example, because you don't have to  
10 have someone pulling copper cable or fiber  
11 optic cable. You can simply install an  
12 antenna and transmitter and receiver end and  
13 you're operating within that radius.

14 Q Now the other thing that you  
15 mentioned of note in the last year is the  
16 announcement by Ford?

17 A Yes, that's right.

18 Q And what is that again?

19 A They announced that they're making  
20 an option in the 2007 Ford F150 pickup truck,  
21 an internet radio installed into the dashboard  
22 that works with cellular frequencies and that

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1 in the future will use something more than  
2 cellular.

3 Q Why is that important?

4 A It's important because now we're  
5 bridging the idea that people have to bring  
6 their own internet radio to the idea that one  
7 is built into the car when you buy the car.

8 Q And will that allow internet  
9 webcasters to reach audiences in the car?

10 A To be sure. They can reach them  
11 in the car already. For example, I can listen  
12 to internet webcasters in the car or even in  
13 this Hearing Room, I can listen. But I need  
14 to carry a device and to have that device set  
15 up and so forth and to power it myself with  
16 batteries and keep it charged and have some  
17 headphones or speakers to listen to. In this  
18 case, because it's built into the car, it's  
19 there when you get there. It should work  
20 seamlessly and it should be easier to use  
21 while you're driving the car. One presumes  
22 that when the manufacturer installs it that

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1 they've done some work on usability and user  
2 interface. It makes it easier to do while  
3 you're driving.

4 Q Now you mentioned this is a -- at  
5 least originally a cellular device, rather  
6 than a WiFi device or WiMax device?

7 A Yes, that's right, because as I  
8 mentioned, WiFi, unless you set up a lot of  
9 different units in a municipality it can be a  
10 short-range technology and cellular is not.  
11 In fact, I've used cellular, as I think I  
12 wrote in my testimony, to drive a long  
13 distance and to see webcasts along the way.

14 So cellular is what we would use  
15 typically today to cover, as we are driving,  
16 or going over a distance, but WiMax will soon  
17 be available to us.

18 Q So cellular is something that you  
19 can use to access the Internet and get music  
20 that way?

21 A Oh yes.

22 CHIEF JUDGE SLEDGE: Mr. Joseph?

1 MR. JOSEPH: Objection, Your  
2 Honor. I move to strike the discussion of  
3 cellular and what the witness can do with  
4 cellular. That is not new development he's  
5 talking about, in fact, what he does today.  
6 He hasn't tied it to new development.

7 MR. HANDZO: I am sorry, Your  
8 Honor, it was intended to tie to the fact that  
9 Ford is putting these devices in its cars and  
10 they are cellular devices as opposed to WiMax  
11 devices, so I wanted the Court to understand  
12 that distinction and what it means.

13 CHIEF JUDGE SLEDGE: Overruled.

14 BY MR. HANDZO:

15 Q Mr. Griffin, again, since your  
16 original testimony back in October, has there  
17 been any expansion of municipal wireless  
18 networks?

19 A Yes. Significant expansion of  
20 those networks. I mentioned, as an example,  
21 our nation's biggest city, New York, is now  
22 getting a profusion of wireless WiFi access to

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1 its citizenry, without any investment by the  
 2 New York municipal government. That's an  
 3 example. We see similar developments in San  
 4 Francisco and in Philadelphia. Again, they  
 5 can be slightly different in these cases.  
 6 Sometimes it's being paid for, sometimes  
 7 they're going to charge for it, but in  
 8 general, we're seeing a broad expansion of  
 9 WiFi across municipal areas.

10 Q Who is building those networks if  
 11 the local government is not actually paying  
 12 for it?

13 A Well, in some cases, it's an  
 14 internet service provider or say Google  
 15 becoming an internet service provider, saying  
 16 we would like to be in this business of  
 17 providing wireless access to the citizens of  
 18 San Francisco. An example, I'm directly  
 19 familiar with Nokia, said we're happy to pay  
 20 for this wireless access to the citizens of  
 21 New York. And so it can be a private endeavor  
 22 in those cases and in other municipalities

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1 they simply decide it would be useful for the  
2 police department and the fire department and  
3 the utility workers and it spills over to be  
4 an advantage to the citizenry.

5 Q You mentioned Google building out  
6 a network. Is that sort of a hypothetical or  
7 has Google actually offered that in the recent  
8 past?

9 A No, they've offered it and they're  
10 doing it in San Francisco.

11 Q Do you know how many  
12 municipalities have begun building out  
13 networks in the last year?

14 A I don't have a list. It would be  
15 quite a significant list, I think. Certainly  
16 not one I'd remember.

17 Q You mentioned wireless networks or  
18 cars now being enabled to get wireless  
19 networks, at least Ford automobiles. In the  
20 last year, has that ability to get wireless  
21 networks also extended to airplanes?

22 A Sure. It's extended to airplanes.

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1 It's extended into a number of places.

2 Q On the sort of receiving side of  
3 the wireless networks, are there new devices  
4 that have come out in the last year to get  
5 these signals?

6 A Yes, I'd say over the last year  
7 we've begun to see more devices that combine  
8 cellular and Wi-Fi. In other words, dual  
9 reception devices that can use more than one  
10 means to get their digits. I mean, typically,  
11 a cellular phone used one of five leading  
12 cellular technologies to get its voice across  
13 and then some limited amount of data across.  
14 And now these same new devices might have  
15 three different means of swapping digits:  
16 cellular, Wi-Fi, and perhaps Bluetooth. And  
17 it could use any of these means to get digits  
18 and play them as music.

19 And in fact, the companies that  
20 make them are included software appliances or  
21 making software appliances available for them  
22 that play Internet radio, that say this is for

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1 playing Internet radio on what you and I might  
2 typically call a phone, but which they don't  
3 want to call phones anymore because they do  
4 much more than a telephone would do.

5 Q One of the things you mentioned  
6 that these devices were enabled to get is  
7 Bluetooth. Tell us what Bluetooth is?

8 A It's a very short range technology  
9 that would typically be used to replace a  
10 cable. For example, a cable that runs 10  
11 feet, 30 feet, 50 feet. You could use  
12 Bluetooth technology to replace that cable and  
13 that becomes important in having the device  
14 talk to, say, the car stereo or the home  
15 stereo or the home computer.

16 Q Mr. Griffin, as these devices have  
17 become available that allow the user to get  
18 onto the internet via Wi-Fi or Wi-Max or  
19 cellular, have webcasters in the last year  
20 been doing deals to get their music played  
21 over those devices?

22 A Yes.

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1 Q Can you give us some examples?

2 A Well, I know Clear Channel has a  
3 station. They started with one in New York  
4 and they made that available, and I think it  
5 was Z100 that they said well, now you could  
6 subscribe to our station over cellular. But  
7 again, that's a marketing decision to do that.  
8 The technology to do that, you know, wasn't  
9 entirely new, of course.

10 Q But the deal is new?

11 A The deal is new. Right.

12 Q And you mentioned, I think, that  
13 some of these devices come sort of pre-set  
14 with stations?

15 A Yes, it happens that webcasters  
16 talk to those who make the devices and when  
17 they come out of the box, sometimes they have  
18 pre-set stations included with them.

19 Q And what, if you know, what  
20 percent of devices being marketed today have  
21 the ability, devices meaning cell phones or  
22 PDAs or whatever, have the ability to play

1 music over the internet?

2 A I'd say that it would be the rare  
3 device that did not.

4 MR. HANDZO: Your Honor, I think  
5 that completes my examination within the  
6 parameters that the Court gave me. The last  
7 thing I have to do is we have a video of an  
8 ad, a television ad, that Mr. Griffin  
9 referenced earlier. I do want to play that.  
10 And also, Mr. Griffin did a demonstration  
11 basically showing within D.C. how he could get  
12 music wirelessly over these devices in a  
13 number of different places. That video takes  
14 about five minutes to play, so I'd like to go  
15 ahead and demonstrate those now and that will  
16 conclude my testimony, or examination.

17 CHIEF JUDGE SLEDGE: All right.

18 MR. JOSEPH: Your Honor, with  
19 respect to the second demonstration, it's just  
20 not clear me -- I'm sorry. With respect to  
21 what Mr. Handzo said about the second  
22 demonstration, it's not clear to me that that

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1 demonstration demonstrates new technologies  
2 within the past year or is simply again  
3 material that has been ruled outside of the  
4 proper scope of rebuttal.

5 I don't know whether he's got a  
6 representation or what it is.

7 MR. HANDZO: What it represents,  
8 Your Honor, is the proliferation of these  
9 networks in the recent past, such that he can  
10 now go outside and go a lot of different  
11 places in D.C. and obtain music wirelessly  
12 over the internet. But that is a recent  
13 development, because as he's described in his  
14 testimony, these are networks that have been  
15 proliferating just in the recent past.

16 CHIEF JUDGE SLEDGE: Okay, thank  
17 you. Everyone is invited to come in front of  
18 the screen.

19 MR. HANDZO: While everyone is  
20 doing that, Mr. Griffin, can you just tell us  
21 briefly what it is we're about to see?

22 THE WITNESS: Sure.

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1 (Video presentation.)

2 MR. HANDZO: I think that  
3 completes Mr. Griffin's examination, except  
4 that earlier in the testimony we talked about  
5 some television advertising that webcasters  
6 were doing and I would just ask to play that  
7 now and Mr. Griffin, you can tell us what that  
8 is.

9 (Presentation.)

10 BY MR. HANDZO:

11 Q Mr. Griffin, is that the  
12 television advertising or one example of it  
13 you were talking about before?

14 A Sure, that was the ad that I was  
15 referring earlier.

16 Q And showing people being able to  
17 stream at work?

18 A Over a computer. Correct.

19 MR. HANDZO: Thank you. That's  
20 all I have, Your Honor.

21 CHIEF JUDGE SLEDGE: Does anyone  
22 want to take a recess for a few minutes?

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1 MR. LARSON: Five minutes would be  
2 great, Your Honor.

3 CHIEF JUDGE SLEDGE: We haven't  
4 had one. We'll recess for five minutes.

5 (Off the record.)

6 CHIEF JUDGE SLEDGE: Thank you,  
7 we'll return to order.

8 CROSS EXAMINATION

9 BY MR. LARSON:

10 Q Hello, Mr. Griffin. You remember  
11 I'm Todd Larson. We met at your deposition.

12 A Indeed, I do.

13 Q I'm here representing DiMA as well  
14 as AOL and Yahoo in this proceeding.

15 A Yes.

16 Q I'll be asking you a few questions  
17 this morning. I want to ask you first about  
18 the video we just watched, actually. Now you  
19 started the video with listening to a webcast  
20 station on a device in your office, correct?

21 A It wasn't my office. It was at  
22 the law firm's office in the conference room.

1 Q Okay, and that was through a WiFi  
2 connection?

3 A Initially, that was the first  
4 device. That was the Nokia 770.

5 Q Okay, and could you have done,  
6 listened to a webcast through a WiFi  
7 connection in September of 2005 as opposed to  
8 September of 2006 when you made the video?

9 A I don't know. It's an interesting  
10 question. I don't know the answer to whether  
11 I could have done it.

12 Q Okay. And you listened then after  
13 that to a device through a cellular  
14 connection, is that right?

15 A That's right.

16 Q And you did that both in the  
17 office and in the park?

18 A That's right.

19 Q Could you have done that  
20 demonstration in September of 2005?

21 A I know I didn't have a device in  
22 September of 2005 that could do cellular and

1       WiFi.

2               Q       Did those devices exist?

3               A       You know, I don't know if they did  
4       to be honest with you.   Something makes me  
5       think that they did not.   Certainly the  
6       devices I have were not available at that  
7       time.   And the devices that I had at that time  
8       I don't recall.   They certainly weren't the  
9       ones that I used in this demonstration.   They  
10      weren't this size and so forth.

11              Q       Let's move to your statement.   You  
12      say on page one that real revenues are flowing  
13      to webcasters?

14              A       The rebuttal statement?

15              Q       Yes.

16              A       And this is page one?   I'm there.

17              Q       This statement is not based on  
18      your review of an commercial webcaster's  
19      revenue figures or documents.   Is that  
20      correct?

21              A       The statement is not based on  
22      that.

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1           Q     Now on page five you say, the top  
2 of page five, that the business is so  
3 profitable that AOL and other service  
4 providers are moving from charging the  
5 audience for access to the network to simply  
6 charging the network sponsors for access to  
7 the audience.

8                     When you used the phrase "the  
9 business is so profitable", do you include  
10 webcasting in that statement?

11           A     Yes.

12           Q     It's true, is it not, that you've  
13 not cited or provided any analysis or  
14 financial reports of webcaster advertising as  
15 the basis for this contention.

16           A     That's right.

17           Q     And you had not reviewed any of  
18 AOL's financials, correct?

19           A     Nothing that isn't publicly  
20 available.

21           Q     Now you list a job posting here,  
22 just below. This is -- actually, it's Exhibit

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1 232 in the books, so you can just flip to  
2 that?

3 A Yes.

4 Q So on the first page of this  
5 exhibit where it says summary?

6 A Yes.

7 Q You'll see that that's where you  
8 start quoting, correct? Join the audience  
9 business?

10 A That's right.

11 Q And then I direct your attention  
12 to the second sentence. It says "as senior  
13 manager, you will be part of the business  
14 development team for AOL's entertainment  
15 channels including AOL music, AOL television,  
16 AOL movies, and leading internet franchises  
17 such as Sessions and Unscripted." You see  
18 that?

19 A Yes.

20 Q Now in your testimony, your  
21 written testimony, you stopped the quote after  
22 AOL music. You see that?

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1 A Yes.

2 Q And why did you do that?

3 A Because it had already included  
4 the following information by saying for AOL's  
5 entertainment channels. And I simply wanted  
6 to be clear that that included AOL music as  
7 one, but not, of course, an exhaustive  
8 recitation.

9 Q Right, but by only including AOL  
10 music, your quote didn't specify that AOL  
11 entertainment also includes movies and  
12 television, correct?

13 A Well, it includes more than AOL  
14 television and movies. So it didn't include  
15 all of them, because they didn't even include  
16 all of them.

17 Q So AOL's audience business, just  
18 stepping back which is the beginning of the  
19 quote, AOL's audience business comprises much  
20 more than AOL music, correct?

21 A Oh, yes.

22 Q And it comprises much more than

1 AOL entertainment?

2 A Oh, yes.

3 Q So the \$1.5 billion dollar figure  
4 here -- strike that. You don't know what part  
5 of the \$1.5 billion dollars in revenue that's  
6 listed here is for AOL entertainment as  
7 opposed to other AOL offerings outside of  
8 entertainment, correct?

9 A No, I don't.

10 Q And within entertainment, you  
11 don't know what part of the revenue is music  
12 as opposed to television or movies, correct?

13 A I don't think anybody could.

14 Q And even further down, within  
15 music's subportion of this, you don't know  
16 what portion of their revenue is webcasting  
17 revenue as opposed to say videos or on-demand  
18 streaming or things like that, correct?

19 A I don't think even AOL knows.

20 Q Well, are you aware that AOL  
21 tracks revenues by different business units?

22 A Oh, sure. That wouldn't be the

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1 conclusive answer.

2 Q But they attempt to do so,  
3 correct?

4 A I think you could apply whatever  
5 arbitrary definition you wanted, but it  
6 wouldn't be an explanation for why that person  
7 came to you or why you kept them or why they  
8 stayed or why they did the other things they  
9 did.

10 CHIEF JUDGE SLEDGE: Why they put  
11 revenue into one space and not another space?

12 MR. LARSON: Fair enough.

13 BY MR. LARSON:

14 Q Now you say the audience business  
15 is generating record revenues?

16 A Yes.

17 Q There's no reference in this job  
18 posting to record revenues, correct?

19 A This one job posting? No. I  
20 don't think it says the word record revenues.  
21 It says fastest growing business, but it  
22 doesn't say record revenues.

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1 Q So what's the basis for your  
2 contention after the quote that the audience  
3 business is generating record revenues and  
4 profit growth?

5 A Well, if you were to add Google  
6 into that equation, then others who sell  
7 audience, I'd say it's record -- we're setting  
8 a record with this. Google hit \$500 a share  
9 yesterday.

10 Q I'm not asking about Google. I'm  
11 asking about AOL. So is it your contention  
12 that AOL's revenues are record setting?

13 A I don't think I said specifically  
14 that AOL's were record setting.

15 Q Well, you said AOL's help wanted  
16 advertisement makes clear what they would  
17 rather not admit at a rate setting hearing.  
18 The audience business is generating record  
19 revenues and profit growth?

20 A If the audience business is  
21 generating record revenues and profit growth.

22 Q Is it your testimony that AOL's

1 audience business is generating record  
2 revenues and profit growth?

3 A I don't know if AOL specifically  
4 is.

5 Q Okay. And have you cited in this  
6 statement or provided any evidence of revenues  
7 of the audience business for any other  
8 services beside AOL?

9 A No, I don't think I quoted any  
10 numbers. I just included AOL's own quote  
11 about what its business was doing that it  
12 quoted in an effort to attract employees.

13 Q Now on page three of your  
14 statement, you suggest that the rumors of the  
15 death of webcasting were greatly exaggerated  
16 in 2002. Do you see that?

17 A Yes.

18 Q And you were a witness in what  
19 we'll call CARP 1, back in 2001 and 2002.  
20 Correct?

21 A I was.

22 Q And you're aware that the CARP

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1 rate was set in February of 2002?

2 A I think that's right, yes.

3 Q And it was adjusted by the  
4 Librarian of Congress in July of 2002?

5 A Right.

6 Q And are you aware that the number  
7 of webcasters dropped significantly after that  
8 ruling by the Librarian?

9 A I believe it did.

10 Q And is it possible that the  
11 decline or a cause of the decline was the  
12 setting of the initial CARP rate?

13 A It could be possibly a cost.

14 Q Now you quote Mr. Robedee here in  
15 the middle of page three. And you're  
16 suggesting here that the complaints by people  
17 like Mr. Robedee about the CARP rate were  
18 unwarranted, correct?

19 A I believe their speculation proved  
20 inaccurate.

21 Q And that, in fact, webcasting  
22 survived just fine under the CARP rates that

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1 were put forward in CARP 1, right?

2 A It thrived.

3 Q Now are you aware of something  
4 called the Small Webcaster Settlement Act?

5 A I'm familiar with it.

6 Q Are you aware that that was passed  
7 in late 2002 because small webcasters and  
8 noncommercial webcasters complained to  
9 Congress that they could not afford the rate  
10 set by the Librarian in CARP 1?

11 A I couldn't tell you all the  
12 reasons why it happened.

13 Q Are you aware that the Small  
14 Webcaster Settlement Act allowed for payment  
15 by small webcasters on a percentage of revenue  
16 royalty, rather than a use royalty?

17 A I believe that's right.

18 Q And are you aware that that same  
19 act allowed noncommercial stations, like Mr.  
20 Robedee's, to pay a flat minimum fee?

21 A Yes, sure.

22 Q And are you aware of what that fee

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1 is?

2 A I don't recall specifically what  
3 it is. I would look it up. It's typically  
4 what I do with numbers. I have them call  
5 David Oxenford or someone like that to find  
6 out.

7 MR. LARSON: I'm going to mark  
8 this as Exhibit 8, if that's okay.

9 (Whereupon, the above-  
10 referred to document was  
11 marked as Services  
12 Exhibit R-8 for  
13 identification.)

14 MR. HANDZO: Your Honor, I'm going  
15 to object to questions specifically going to  
16 the Small Webcaster rates. Those rates, by  
17 statute, are supposed to be non-precedential  
18 and shouldn't be admitted in this proceeding.

19 CHIEF JUDGE SLEDGE: Does this  
20 have something to do with Exhibit 8?

21 MR. HANDZO: I believe so, yes.

22 CHIEF JUDGE SLEDGE: Mr. Larson?

1 MR. LARSON: Yes, Your Honor, I'm  
2 not offering these rates as precedent. I'm  
3 aware that the Small Webcaster Settlement Act  
4 specifically said that the rates could not be  
5 used as precedent. I'm actually just showing  
6 them to make clear what Mr. Robedee is paying,  
7 because Mr. Griffin's testimony suggests that  
8 webcasters have survived fine under the CARP  
9 rate. And if this shows that Mr. Robedee is  
10 in fact not paying the CARP rate, then it  
11 would go to the credibility of Mr. Griffin's  
12 testimony. But I'm not intending to offer  
13 these rates as precedent, which is barred by  
14 the Act.

15 CHIEF JUDGE SLEDGE: Mr. Handzo?

16 MR. LARSON: Your Honor, I rise  
17 because I was going to ask a similar question.  
18 I want to preserve my right to do so. Mr.  
19 Griffin has clearly opened the door. He's  
20 implied with his testimony, in fact, has as  
21 much stated, that there were many complaints  
22 from Mr. Robedee and others including those

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1 writing to Mr. Robedee who work for small  
2 collegiate, noncommercial broadcasters, that  
3 they were going down. And Mr. Griffin's  
4 testimony says everybody did just fine. These  
5 were all profit. It seems to me he's opened  
6 the door wide open on the question of what  
7 these people actually were paying and why  
8 they're still here today.

9 CHIEF JUDGE SLEDGE: Well, rather  
10 than putting into evidence something that  
11 statute says cannot be in evidence, or cannot  
12 be considered, doesn't that response that you  
13 are seeking simply require evidence that Mr.  
14 Robedee is not paying the royalty rates set by  
15 the Librarian of Congress, as stated in the  
16 statement on page three?

17 MR. JOSEPH: That would be a  
18 start, Your Honor, but given the statement  
19 that the witness has made, it would be  
20 appropriate, at least I would argue that it  
21 would be appropriate to say exactly what he  
22 was paying just because it shows how absurd

1 the comment made by the witness was. It goes  
2 to the credibility of the witness in that  
3 regard.

4 CHIEF JUDGE SLEDGE: Objection  
5 sustained.

6 BY MR. LARSON:

7 Q Mr. Griffin, are you aware that  
8 Mr. Robedee's organization pays a rate for its  
9 webcasting which is not the rate set by the  
10 Librarian of Congress in 2002?

11 A Sure.

12 Q And so if Mr. Robedee is in fact  
13 still in business and in fact a participant in  
14 this proceeding, there's no sign in that the  
15 royalty rate set by CARP 1 was or was not  
16 affordable. Correct?

17 A Sure, there is. I mean, because  
18 you can negotiate it down. In other words, a  
19 higher rate is rarely a problem because both  
20 parties want to maximize revenue and they'll  
21 negotiate an appropriate rate. But a rate  
22 that's too low, of course, is a huge problem.



1 So a higher rate does not mean the death of  
2 the webcasting industry because those  
3 responsible can negotiate another rate or work  
4 out another arrangement or the Librarian of  
5 Congress can adjust it to a different place.

6 Q I'm asking specifically about Mr.  
7 Robedee here, and the fact that Mr. Robedee is  
8 still being in business is irrelevant to the  
9 royalty rates set by the first CARP, is it  
10 not?

11 A No, I don't think it's irrelevant.

12 Q He's not paying that rate, though.  
13 Correct?

14 A He's paying a different rate that  
15 reflects more of a market type condition.

16 Q Now you say on page four, I'm  
17 sorry, in the first full paragraph --  
18 according to BRS Media, which webcasters  
19 themselves rely on in their testimony,  
20 following along, is in evidence of decline in  
21 webcasting. There were as many webcasters  
22 operating in April 2005 as there were in 2001,

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1 at a time when webcasters were paying nothing  
2 for the right to play sound recordings. Now  
3 it's true, is it not, that the DMCA created a  
4 royalty requirement for webcasters going back  
5 to 1998, correct?

6 A I believe that's right, yes.

7 Q And webcasters operating in 2001,  
8 in fact, owed royalties for the performance of  
9 sound recordings, correct?

10 A I don't know that they perceived  
11 that.

12 Q Well, whether they perceived it or  
13 not, they owed those royalties, correct?

14 A Retrospectively, yes.

15 Q Right. So if they weren't paying,  
16 it wasn't because the royalties weren't owed?

17 A Well, they wouldn't know what they  
18 would be.

19 Q Right, the decision hadn't been  
20 announced yet, correct?

21 A Right.

22 Q And once it was announced, they

1 then retroactively owed payments back from  
2 1998?

3 A That is how it turned out, that is  
4 right.

5 Q Now in the following paragraph,  
6 you cited a growth number for portals like  
7 AOL, Yahoo, Microsoft, etcetera of 177 percent  
8 from October '04 to October '05?

9 A Yes.

10 Q And you provide a footnote to  
11 Arbitron is the measure of that?

12 A Yes.

13 Q Now that growth has slowed  
14 considerably from 2005 to 2006, has it not?

15 A I'm not sure about that, but it  
16 could have, yes.

17 Q In fact, the growth rate from '05  
18 to '06 was less than a quarter of the 177  
19 percent that you quote, correct?

20 A Might be.

21 Q Does 38 percent ring a bell to  
22 you?

1           A     Thirty-eight percent sounds good  
2           to me, too.

3           Q     You mentioned Pandora on page 4 as  
4           an example of a webcaster that typifies the  
5           growth of the industry, is that right?

6           A     It's an example, yes.

7           Q     Are you aware of Pandora's  
8           functionality?

9           A     I am.

10          Q     And are you aware that users can  
11          enter the names of favorite artists or songs  
12          and the service will create a station that  
13          features music similar to those artists or  
14          songs?

15          A     Not just similar, it could include  
16          that artist and those songs

17          Q     Right. Although you can't enter  
18          the name of the song and have it played  
19          immediately, correct?

20          A     It has happened to me, believe it  
21          or not. So to say it does not happen, but I  
22          think it's not their intention that that

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1 happens every time. But it has certainly  
2 happened.

3 Q And in terms of -- strike that.  
4 Are you aware that Pandora allows users to  
5 rate songs while they're listening in a way  
6 that influences what gets played on the  
7 station?

8 A It allows you to do so.

9 Q Are you aware that Yahoo  
10 Launchcast offers similar functionality?

11 A I believe it does.

12 Q And are you aware that certain  
13 record labels have sued Yahoo for including  
14 those features in customized stations?

15 A You know, I don't know the status  
16 of that. I really don't.

17 Q You're not aware that Yahoo was  
18 sued?

19 A I really don't. I'm not aware of  
20 the status of that.

21 Q So do you know -- strike that. By  
22 including Pandora in your statement, did you

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1 make the assumption that Pandora is a service  
2 that qualifies for the statutory license?

3 A I do make that assumption. I  
4 believe they're paying under it and operating  
5 under it. As to the status of any challenges  
6 and so forth to the user interface, I'm not  
7 familiar with it.

8 Q Okay, can you turn to Exhibit 230  
9 in your book?

10 A I'm there.

11 Q Now you cite this in your  
12 testimony, correct?

13 A I do.

14 Q And that's because you believe  
15 this to be an accurate and reliable measure of  
16 the webcasting market?

17 A No.

18 Q It's not?

19 A No, I think it's a reliable  
20 relative indicator, but I think it's very  
21 difficult to know exactly what station someone  
22 is listening to at any given time and so

1       forth. Arbitron does its best and I think,  
2       you know, you use statistical measures, but as  
3       to its accuracy, I'm not going to attest. But  
4       it is a relative measure that the industry  
5       relies upon.

6               Q       And so you cited something in your  
7       testimony that you don't believe is accurate?

8               A       To be honest, I have doubts about  
9       it too, as does everybody. All information  
10      has flaws. Arbitron's has flaws too, but it  
11      is a measure that the industry relies upon for  
12      relative members. But I think we all concede,  
13      including the industry that relies upon them  
14      that there are inadequacies that Arbitron has,  
15      so when you asked me straight up do I think  
16      it's an entirely accurate measure of industry  
17      performance, I think I should respond to you  
18      as does most of the industry. We have some  
19      doubts about it, but we do use it as a  
20      relative measure.

21              Q       You're talking in terms of its  
22      measures of -- Arbitron's measures of

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1 webcasting listening?

2 A I think almost any numbers, yes.

3 Q Now what this is, if I'm right, is  
4 a study that is a survey of users and their  
5 behaviors, correct?

6 A Yes. It's performed together with  
7 Edison.

8 Q And so that's not -- this isn't  
9 the weekly measure or monthly measure of  
10 webcasting listening that Arbitron also  
11 provides, correct?

12 A No, but some of the same  
13 methodologies. They asked 1925 people what  
14 they thought, similar to how Arbitron does its  
15 ratings and one of the things the industry  
16 criticizes.

17 Q Now I wanted to ask you about  
18 something on page five of the study.

19 (Pause.

20 Just a clarification. In your  
21 testimony at the bottom of page three, running  
22 over to page four, your testimony says that

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1 Arbitron found that weekly listening to  
2 webcasting had grown 50 percent in the past  
3 year. Do you see that?

4 A Yes.

5 Q Looking at page five, just for  
6 clarification sake again, what this actually  
7 shows is that the weekly audience grew by 50  
8 percent, not the listening in terms of hours.

9 A Okay. I believe you.

10 Q Well, is that the correct  
11 interpretation of the --

12 A Actually, it could be a correct  
13 interpretation. I don't have the original  
14 data from the study, but --

15 Q But based on what you see here,  
16 that's the correct interpretation?

17 A Seems right, a number of people  
18 have listened.

19 Q Look at page 12 of this setting.

20 A Yes, I'm at page 12.

21 Q You see it says under paragraph  
22 17, one finding of the study was that three-

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1       quarters of the digital radio audience predict  
2       that they will continue listening to the same  
3       amount of AM-FM radio. Do you see that?

4               A       I do.

5               Q       And then down at 18 it says AM-FM  
6       radio does not appear to be losing time spent  
7       listening to the new digital radio platforms,  
8       do you see that?

9               A       I see it.

10              Q       Do you believe those to be  
11       accurate statements?

12              A       No.

13              Q       And why not?

14              A       Well, I think like much of the  
15       industry, there's a belief today that FM  
16       listening is going down and that audience is  
17       being lost to new digital media.

18              Q       So you think they just got it  
19       wrong in this study?

20              A       Sure.

21              Q       And this is a study that you again  
22       have provided and quoted in your testimony,

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1 right?

2 A One part of it. I think it's an  
3 accurate measure. I think it's quite clear  
4 that there are a lot more people listening to  
5 internet radio. Whether they are correct in  
6 saying that they are listening to as much AM-  
7 FM as they do, it's hard to tell.

8 Q So your testimony is that part of  
9 this document is accurate and part of it is  
10 not?

11 A Yes. I believe the part that  
12 shows the increase in numbers. I don't  
13 believe the part that interprets how it will  
14 affect AM-FM radio and I'm not alone in that.

15 Q Okay. Now you suggest on page 67  
16 of your testimony, do you not, that people --

17 A Page 67 did you say?

18 Q 6-2-7.

19 A 6-2-7. Okay, I'm there.

20 Q You suggest that people listen to  
21 webcasting where AM and FM radio signals have  
22 penetrating the walls of buildings?

1           A       Yes, I'm not the only one, but  
2           yes, that's considered to be a problem.

3           Q       And so it's possible, is it not,  
4           that webcasting is allowing some people to  
5           listen at times when they wouldn't previously  
6           have listened to music?

7           A       Sure.

8           Q       Now actually back on the Arbitron  
9           study, I want to ask you about one other point  
10          on page 14 of that study.

11          A       Yes.

12          Q       Paragraph 22?

13          A       Yes.

14          Q       Do you see it says one third of  
15          weekly on-line radio listeners have purchased  
16          music from an on-line music download store?

17          A       Yes.

18          Q       And then continues, "those who  
19          listen to on-line radio platforms such as  
20          internet radio or podcasting are much more  
21          likely to have purchased downloadable music  
22          than the average American?

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1 A Sure.

2 Q And in fact, in the graph, weekly  
3 internet radio listeners, the highest of the  
4 choices given there, correct?

5 A I see that.

6 Q So what the statistics is showing,  
7 is it not is that people who regularly listen  
8 to internet webcasts are more likely to hear  
9 the music and potentially purchase that music?

10 A Sure, people who listen to music  
11 buy music, yes.

12 Q Now in footnote eight of your  
13 statement, located on page four?

14 A Yes.

15 Q I want to direct your attention to  
16 the last sentence of that?

17 A Yes.

18 Q You say "although not satellite  
19 radios equal at present, webcasting will rival  
20 it during the license period."

21 A Yes.

22 Q Can you tell us what you meant by

1 that statement?

2 A I believe that webcasting is  
3 growing and during the time period of this  
4 license that it will reach the point where it  
5 has as much potential as satellite radio does  
6 or as much realization as satellite radio  
7 does.

8 Q And do you mean this in terms of  
9 number of listeners or -- number of listeners?

10 A As a business.

11 Q Do you mean that webcasting will  
12 rival satellite radio in terms of its  
13 offerings?

14 A I would say in terms of its  
15 business opportunities.

16 Q And what do you mean by business  
17 opportunities?

18 A The kind of revenue that it  
19 attracts.

20 Q Okay. Now when you say that  
21 webcasting is currently not satellite radio's  
22 equal, you mean that the current webcasting

1 offerings are not quite the equal of satellite  
2 radios in terms of comprehensiveness, correct?

3 A Comprehensiveness? No, I think I  
4 said revenue.

5 Q Okay. Do you remember you were  
6 deposed in this --

7 A I do.

8 Q These are actually marked already.  
9 I've marked this as Exhibit 7.

10 (Whereupon, the above-  
11 referred to document was  
12 marked as Services R-7  
13 for identification.)

14 Now you were deposed in this  
15 proceeding, correct?

16 A Oh, sure.

17 Q In fact, I was the one who asked  
18 you questions at the deposition.

19 A You were.

20 Q Now take a look, if you would, at  
21 your deposition at page 47 of 48?

22 And it's the -- the number that

1 you want to look at is the number in the --  
2 the numbers are in the right corner, lower  
3 right hand corner of the page.

4 A Right.

5 Q So you see 47 of 48?

6 A Yes. Okay, now I do see 47, it's  
7 above 48.

8 Q Right, exactly.

9 A I see.

10 Q So if you take a look there, you  
11 see -- let's start up on page 47 at line 12,  
12 your answer.

13 A Yes.

14 Q "I think that webcasting will  
15 rival satellite radio during this time period,  
16 during the time frame 2006 to 2010."

17 Question: "By rival, do you mean  
18 in terms of usage?"

19 Answer: "Yeah, I would say in  
20 terms of its offerings, in terms of its  
21 comprehensiveness, in terms of the commercial  
22 opportunity it presents."

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1 A Yes.

2 Q "Do you believe that webcasting  
3 usage will rival satellite radio usage?"

4 "I don't think that's exactly what  
5 I'm talking about here. I'm talking about how  
6 well it reaches out to its audience, the  
7 comprehensiveness of the offering, how well it  
8 pulls itself together."

9 Do you recall testifying to that  
10 effect?

11 A I do.

12 Q And do you stand by those  
13 statements?

14 A Sure. It ends in terms of  
15 revenue, yes.

16 Q But also in terms of its offerings  
17 and its comprehensiveness, correct?

18 A Yes, but they reflect themselves  
19 in revenue.

20 Q Right. Now do you believe that  
21 webcasting and I'm sorry if I've asked you  
22 this in a different form, but that webcasting

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1 will be satellite radio's rival for audience?

2 A Will it be its rival?

3 Q I'm going to put it another way.

4 Do you believe they compete for listeners?

5 A Sure. They do. And in fact,  
6 sometimes they use internet radio to reach  
7 their listeners, satellite does.

8 Q Now at one point in your statement  
9 you say -- you ask whether it's fair for Clear  
10 Channel to pay a different royalty than Yahoo  
11 when it is competing for Yahoo's audience. Do  
12 you recall that?

13 A I do.

14 Q Do you believe it's fair for XM or  
15 Sirius to pay a different royalty than Yahoo  
16 if they're competing for an audience?

17 A Ultimately, I hope that they pay  
18 the same rate.

19 Q Now let's talk about some of the  
20 portability points that you make in wireless.  
21 At the beginning of your statement you say  
22 that webcasts --

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1           A       I think just to be entirely clear,  
2 my goal is that one not be advantaged versus  
3 the other. I think whether the specific rate  
4 is the point, it's the -- the government  
5 shouldn't substitute its judgment for the  
6 market.

7           Q       Let's move a long. You say on  
8 page one of your statement that webcasts are  
9 progressing faster and further than ever  
10 towards true wireless?

11          A       Where is this?

12          Q       Page one.

13          A       Page one.

14          Q       Do you want me to read that again  
15 for the record?

16          A       Hold on just a second.

17          Q       Down at the bottom, the paragraph  
18 starting with "Second"?

19          A       Yes, that's right.

20          Q       "Webcasts are now untethered from  
21 wired networks and are progressing faster and  
22 further than previously expected towards true

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1 wireless portability"?

2 A Yes.

3 Q You didn't produce any studies or  
4 analyses of the rates of usage of wireless  
5 webcasting as compared to wired webcasting,  
6 correct?

7 A That's right. I did not.

8 Q And when you wrote this statement,  
9 you weren't referring to or relying on any  
10 particular research, correct?

11 A My research. My expertise. My  
12 experience.

13 Q And any research in particular in  
14 that experience that you looked at that formed  
15 the basis for this?

16 A No one particular thing.

17 Q Any at all?

18 A Sure. I mean I am exposed to a  
19 lot of research and specifically in this area.  
20 Not that I personally possess, but I attend a  
21 number of meetings where this kind of research  
22 comes up and it's clear that it's happening

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1 faster and further than we had thought that it  
2 would.

3 Q And just to be clear, the  
4 statement did you rely on or review any  
5 studies reviewing rates of usage of wireless  
6 webcasting when you wrote this statement?

7 A When I was writing this, I was not  
8 reviewing any particular number, no.

9 Q Were you relying on a particular  
10 study?

11 A In my mind, there were a number of  
12 things that I had seen that showed me that  
13 webcasting would increasingly be a component  
14 and so when I wrote this, I wrote that because  
15 I know that to be true.

16 Q And can you name what any of those  
17 studies were?

18 A No, I don't have those studies. I  
19 don't possess them. My clients do.

20 Q Okay. You also didn't cite or  
21 produce any specific statistics about adoption  
22 or usage rates of wireless webcasting,

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1 correct?

2 A Right, I did not. Well, I did. I  
3 provided Clear Channel's numbers and those  
4 kind of numbers, I mean. They showed 421  
5 percent increase in listening.

6 Q And that's cellular, correct?

7 A Pardon me?

8 Q That's cellular, right?

9 A I don't that's specifically  
10 cellular. In fact, I'm pretty sure it's not.

11 Q It's not?

12 A No. But I think you asked me did  
13 I cite any studies about an increased use of  
14 webcasting and my answer is yes, I did.

15 Q Clear Channel.

16 A That's an example, yes.

17 Q Now if people can listen to  
18 webcasts on mobile devices, as you suggest,  
19 this increases the opportunities for record  
20 labels to earn royalties that are paid on  
21 those webcasts, correct?

22 A It's not an if. They can, in

1 fact, listen on these devices. And so, the  
2 audience has more opportunities to listen.

3 Q Right, and the record companies  
4 have more opportunities to earn royalties,  
5 correct?

6 A It wouldn't necessarily be more,  
7 if it was a shift, but if there's an increase,  
8 yes. More people, more royalties.

9 Q Well, let's just talk about that  
10 shift. If you're in your car, and you  
11 generally listen to radio, terrestrial radio,  
12 the record companies don't receive a royalty  
13 for that, correct?

14 A Well, that person would be an  
15 increase.

16 Q Right. Right, so the person who  
17 then instead listens to webcasts, as you  
18 suggest they might, would represent an  
19 increase for the record company in terms of  
20 its royalty?

21 A Right, yes.

22 Q And as we talked about before,

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1 portable webcasting -- I'm sorry, not  
2 portable, but webcasting could lead to  
3 listening in places like an office where you  
4 couldn't previously have listened to AM-FM  
5 because it wouldn't come through the walls,  
6 correct?

7 A Right.

8 Q And so again, that would represent  
9 an opportunity for the record company to earn  
10 a royalty that it wouldn't otherwise have  
11 earned?

12 A It could, sure.

13 Q Now I want to talk specifically  
14 about WiFi. So if I'm using my laptop and  
15 sitting in a Starbucks or McDonald's, as  
16 you've mentioned in your statement, and I'm  
17 connected via WiFi, I have to pay for that  
18 access, correct?

19 A I think in the average Starbucks  
20 or McDonald's you would have to pay right now.

21 Q And in one of the municipal  
22 networks that you talked about it might be

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1 free if I were sitting in a city park or  
2 something?

3 A Right, I think though to be  
4 completely truthful, and honest in my answer  
5 to your question, it should be clear that I  
6 believe that you can pay a flat fee for those  
7 services and that means that when you sit down  
8 to listen, there's not an economic consequence  
9 to your decision if that's what you're  
10 implying. If you've already paid, you're not  
11 paying by your decision to listen to a  
12 webcast.

13 Q Exactly, you pay Starbucks or T-  
14 Mobile who provides the service for Starbucks  
15 a flat fee for internet access and then you  
16 can do whatever you want.

17 A In those examples of those  
18 particular shops, I mean there are others that  
19 provide it at no charge.

20 Q Correct. Let's stick to Starbucks  
21 or McDonald's just for the next few questions.

22 A The ones that charge you.

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1 Q The ones that charge. Now so if  
2 I'm sitting there with my laptop, I can launch  
3 a browser and surf the web, correct?

4 A That's one thing you could do.

5 Q And I could visit, for example,  
6 iTunes from that laptop, just like I could if  
7 I were sitting at my desk at work or on my  
8 connection at home, correct?

9 A Sure, I think that's possible.

10 Q And so that would represent an  
11 opportunity for iTunes to sell me songs that  
12 it would not have otherwise had, correct?

13 A It's one thing you could do. I  
14 mean you could equally shop at Target, but  
15 again, it's one thing you could do.

16 Q And if I do choose to shop at  
17 iTunes for downloads, it's an opportunity that  
18 the record companies would not otherwise have  
19 had if I couldn't get on line at Starbucks,  
20 correct?

21 A Sure, you could do that or you  
22 could make a wire transfer. I mean there's a

1 lot of things you could do from a laptop  
2 connected to a network.

3 Q So because of Starbucks' and T-  
4 Mobile's investment in wireless access in the  
5 coffee shop, the record companies have an  
6 opportunity to reach consumers and sell them  
7 songs and make money that they would not  
8 otherwise have had, correct?

9 A Not a unique opportunity. It's  
10 just an opportunity like any other digital  
11 opportunity.

12 Q Right, and not one they otherwise  
13 would have had if you couldn't get access  
14 while you were in Starbucks, right?

15 A Again, it's just like anything  
16 else you do with a digital connection. You  
17 could do any of them, that's right.

18 Q Now if that person were sitting in  
19 Starbucks and couldn't get on line, they  
20 couldn't buy music, right?

21 A Pardon me? If they were in  
22 sitting in Starbucks and they couldn't get on

1 line, and no one approached them to sell them  
2 music, then they couldn't buy music. I mean  
3 that's right, yes.

4 Q Okay.

5 A I mean if you go to the McDonald's  
6 in Times Square, I assure you people approach  
7 you to sell you music.

8 Q Well, putting that example aside.  
9 Now if a person listens to a webcast while  
10 they're logged on at their local Starbucks,  
11 the record companies have the chance to earn  
12 a royalty that they would not otherwise have  
13 earned on that webcast, correct?

14 A That's one thing that could  
15 happen.

16 Q Now let's go back to iTunes for a  
17 second. If iTunes sells a download to a  
18 person accessing the Internet through a WiFi  
19 connection at Starbucks, they charge the same  
20 rate to that person for the download as they  
21 were if that person were sitting at his desk  
22 at work, right?

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1           A       Well, they charge the same rate?  
2       As you pointed out, the person is not paying  
3       the same rate because they're paying more the  
4       wireless access, so it does cost more, but  
5       you're saying that the 99 cents that you pay  
6       for download doesn't know that you're on the  
7       other end of a wireless connection, so they  
8       don't adjust it. Is that what you're saying?

9           Q       That's my question.

10          A       No, no.       I think it's your  
11       statement and it's true. I mean they have one  
12       price for someone who comes on a digital  
13       connection. That's right.

14          Q       Whether or not that connection is  
15       wired at your desk or wireless at Starbucks?

16          A       Right.

17          Q       And the payment that you make is  
18       actually to Starbucks or T-Mobile for the  
19       internet access, but iTunes doesn't charge a  
20       higher rate because you're accessing it  
21       wirelessly?

22          A       I don't think they do.

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1 Q Okay. And if I were to visit say  
2 The New York Times' website, The New York  
3 Times doesn't charge people more if they're  
4 accessing their website from Starbucks as  
5 opposed to through a wired connection at work  
6 or at home, correct?

7 A But The New York Times does charge  
8 differently for different things of different  
9 value. I mean they don't have just one price.  
10 If something is worth more, they charge more  
11 for it like Thomas Friedman.

12 Q Fair enough. So The New York  
13 Times offers certain content that they charge  
14 for, right?

15 A Based on value. If they think  
16 something offers a higher value, they charge  
17 a higher price for it.

18 Q Right, so Tom Friedman and some of  
19 their other editorials you have to pay a  
20 monthly subscription or something to get  
21 access to those records?

22 A It's an example of how they vary,

1 based on value.

2 Q And if you went to Starbucks and  
3 were listening wirelessly or logged on  
4 wirelessly at Starbucks, the price for that  
5 Tom Friedman content would be the same, right?

6 A I think it's the same.

7 Q Right. And another thing I could  
8 do while sitting at Starbucks would be to  
9 listen to say Yahoo Launchcast, correct?

10 A Sure, you could do that.

11 Q And Yahoo doesn't charge a premium  
12 if I'm on a laptop connected wirelessly,  
13 right?

14 A I don't think they do today. I  
15 mean I think it offers a different value  
16 proposition to use music wirelessly, if that's  
17 what you're concerned with, but I don't think  
18 today they charge a price that's different.

19 Q Can you name any content provider  
20 that charges one price for providing its  
21 content to users on the Internet who connect  
22 from work or home and charge a different price

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1 when they're connected on their laptop?

2 A It's a trick question. Because  
3 those that do don't typically offer both  
4 access. In other words, to be sure, Sprint,  
5 Verizon, Cingular, etcetera, do offer premium  
6 gardens that charge more because something is  
7 wireless.

8 Q I'm asking about WiFi, not  
9 cellular.

10 A Then it's wireless. I thought  
11 that was your -- oh, you're saying  
12 specifically because it's WiFi?

13 Q Yes. If I'm on a municipal  
14 network in San Francisco or at Starbucks where  
15 I have to pay, are there any content providers  
16 you know of who will charge me more for  
17 accessing their content than they would if I  
18 were sitting at my desk?

19 A On the WiFi part? No, I don't  
20 think they do it by WiFi.

21 Q Okay. You don't think they charge  
22 more if you're connected to the WiFi?

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1           A     I don't think they do. I mean I  
2           don't think that they do, but again, I think  
3           the value may be different and they may do so  
4           in the future.

5           Q     Now the cities you discussed, the  
6           municipal networks, where the commercial  
7           providers like Google who sponsor those  
8           wireless networks, they make significant  
9           investments in those networks, correct?

10          A     Yes, they do.

11          Q     Millions of dollars?

12          A     Yes. I mean I think in some cases  
13          it's millions.

14          Q     And the record companies whose  
15          content is available to people through those  
16          wireless networks, they don't make any  
17          investments in those networks, correct?

18          A     The record companies?

19          Q     Yes.

20          A     No, I don't know of a record  
21          company making an investment into a WiFi  
22          network.

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1 Q But they get the benefit of  
2 consumers' increased access to their content,  
3 as we were talking about before, correct?

4 A The benefit? I mean it could also  
5 be a detriment.

6 Q Well, they get the benefit in  
7 terms of royalties, people listen to webcasts,  
8 right?

9 A Well, now you're making an  
10 assumption that I don't think is necessarily  
11 valid. I mean there's a risk associated with  
12 network access to music without any question -

13 -

14 Q Mr. Griffin, I'm not asking -- I'm  
15 asking a very specific question that I'd like  
16 you to answer.

17 A Yes.

18 Q Do record companies benefit from  
19 the increased access to their content provided  
20 by wireless networks by municipalities or  
21 Google?

22 A Maybe. That's my answer. Maybe.

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1 It's a risk. They could benefit or they could  
2 lose. It could be used for theft of the  
3 content or the acquisition of the content  
4 without paying for it, or it could be  
5 associated with payment. But there's no  
6 question in my mind that the most accurate  
7 answer to your question is that the network  
8 access to music presents a risk to those who  
9 sell that music. It's a compensable risk.

10 Q And it provides a risk and it  
11 provides a corresponding benefit in terms of  
12 royalties --

13 A No, no, no. I didn't say there's  
14 a risk and there's a benefit. There's a risk.  
15 A risk means that it could be good. It could  
16 be bad and it depends upon the circumstances.  
17 Without question, it's a compensable risk. It  
18 would be like if you and I were talking about  
19 vehicular traffic, unquestionably cars present  
20 some benefit. But also unquestionably, they  
21 present a negative and that risk is clearly  
22 compensable with an additional charge for

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1 using a vehicle, even though you'd  
2 unquestionably say you should have one in  
3 order to engage in economic behavior. So  
4 there's a risk associated with network access  
5 to music without any question.

6 Q And that risk exists when users  
7 are accessing the Internet at their desk, too,  
8 correct? Or at home?

9 A There's a risk there, too. The  
10 risk is different in each place and presents  
11 more or less a benefit. I mean certainly a  
12 wireless network presents a greatest risk.

13 Q And why is that?

14 A Well, because music and mobility  
15 are associated with one another in a strong  
16 way. And so the notion that music would be  
17 used wirelessly goes at one of the key reasons  
18 that people would otherwise purchase a phone  
19 or record, so they could have access to it  
20 while they were moving on their Walkman or  
21 their portable device.

22 Q Are you suggesting that wireless

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1 access somehow makes it easier for people to  
2 steal music?

3 A Yes, amongst other things. It  
4 makes it easier to steal it, to use it, to buy  
5 it. You, yourself, have just offered the  
6 notion that it offers a benefit to be able to  
7 access it wirelessly. I am simply pointing  
8 out that there is a downside as well. I mean  
9 if you're going to suggest that it's a big  
10 benefit to the industry, I think it should  
11 also be clear that there are some risks  
12 associated with mobile access to networks that  
13 go directly at music uniquely, because music  
14 is more associated with mobility. We need our  
15 eyes to see for safety. Then we use our ears  
16 for recreation. So a mobile person uniquely  
17 accesses music.

18 Q What does mobility, Mr. Griffin,  
19 have to do with the ability to steal the music  
20 that you're talking about, the downside of  
21 this access?

22 A Because someone -- a great example

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1 are some of the surveys that have been done  
2 with satellite where people say hey, I didn't  
3 buy another CD after that or those who use  
4 music services and say why do I need to  
5 purchase discs now that I have access wherever  
6 I go, wherever I am. Clearly, that's a risk.

7 Q Sir, are you just suggesting that  
8 people subscribe to something like a satellite  
9 service, they'll be less likely to buy CDs?

10 A Yes. I believe that. I believe -  
11 - of course, you will have some people, just  
12 like some people who smoke don't get cancer.  
13 I mean, of course, you're going to have  
14 statistics that run both ways, but in general,  
15 there's a strong substitution when one can  
16 access music wirelessly that is not similarly  
17 true when they are tethered to a copper cable  
18 or a fiber optic cable.

19 Q And they're paying for that  
20 access, correct? Putting pirates aside,  
21 people who are listening to webcasts, the  
22 record companies are compensated for that,

1 right, through a royalty?

2 A One hopes that they are being  
3 compensated, healthily, through a good  
4 royalty, yes.

5 Q Okay. Now you say on page 20 of  
6 your statement that from noncommercial  
7 webcasters to small webcasters to the large  
8 webcasters, all are moving to wireless.

9 A Yes.

10 Q Now is it your testimony that  
11 Yahoo, for example, is moving to wireless?

12 A Oh yes.

13 Q And do you mean by that to say  
14 that it's just now possible that you can  
15 listen to Yahoo on a wireless device?

16 A It's just now possible?

17 Q No. When you say that Yahoo is  
18 moving to wireless --

19 A Yes, they are.

20 Q And what is Yahoo doing different  
21 than they've done before to move to wireless?

22 A Flying to Helsinki, Korea, people

1 who make portable devices, forging  
2 relationships with them. Yes, I know you have  
3 a skeptical look that the Court Reporter  
4 should note, but my point is that quite  
5 directly, they are making those deals and  
6 seeking to have their software and their links  
7 pre-installed on those devices such that they  
8 will go to Yahoo to get their content.

9 Q Wait a second. You're saying that  
10 Yahoo is meeting with Nokia? Is that your  
11 testimony?

12 A Oh yes.

13 Q Who at Yahoo?

14 A I can't give you a specific name.  
15 I'm sure Dave Goldberg is, but I can't say  
16 that I sat there in a meeting between Dave  
17 Goldberg and someone from Helsinki, but I can  
18 tell you that those people in Helsinki and in  
19 Korea and in other places are having meetings  
20 with Yahoo and that it's more than a  
21 suggestion because the end result is that  
22 those devices ship with Yahoo pre-installed on

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1 the menu structures of those devices as a  
2 result of those meetings. So those meetings  
3 are without question. The end result of those  
4 meetings is without question. It's not merely  
5 my guess or my opinion.

6 Q Are you aware of a single meeting  
7 that you can tell us about where Yahoo  
8 discussed providing webcasting, its webcasting  
9 services on a wireless device?

10 A I can't cite the specific meeting  
11 where that happened. It's clear to me that  
12 the answer to my statement is an accurate one.

13 Q Now you showed us some devices  
14 that you tested. It's true, is it not, that  
15 you didn't actually test whether you can  
16 currently listen to Yahoo on a portable  
17 device, is that right?

18 A I've used Yahoo to listen to on a  
19 portable device. I don't recall which one it  
20 was, but we didn't use it in our tests.

21 Q You didn't use it in your tests?

22 A Not in this specific one that we

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1       showed here. I've used devices and used it  
2       before, yes.

3               Q       You've listened to Launchcast on a  
4       wireless device?

5               A       I can't specifically Launchcast.  
6       I can simply tell you I've opened the box, new  
7       wireless devices have Yahoo built into the  
8       menu structure. I've used it to access Yahoo.  
9       Whether the specific example you were asking  
10      me is something that I've done, I can't say.

11              Q       Which device comes pre-installed  
12      with Yahoo on it?

13              A       I don't recall. I truly do not.

14              Q       And the devices that you are  
15      talking about, what Yahoo service is pre-  
16      installed?

17              A       I truly do not recall the specific  
18      services that are pre-installed, but I can  
19      tell you without question that Yahoo people  
20      are working together with mobile device  
21      manufacturers to pre-install their services  
22      and provide as much as they can in a way of

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1 driving traffic towards Yahoo with those  
2 devices and that that includes portable music.

3 Q And you don't know when -- if  
4 these conversations are happening, you don't  
5 know when any of that is going to be released?

6 A I believe some of it has already  
7 been released. I've told you that there are  
8 devices that they come out of the box and have  
9 Yahoo pre-installed on them.

10 Q But you can't --

11 A Which specific device or when the  
12 meeting was, I mean, I don't recall those  
13 things. I'm absolutely sure as I sit here and  
14 tell you honestly that there are meetings with  
15 Yahoo, with not only Nokia, but with other  
16 leading manufacturers of portable wireless  
17 devices.

18 Q Is it your testimony that right  
19 now Launchcast will work on portable devices?

20 A I don't know right now. I didn't  
21 test it today or this week.

22 Q And same question with AOL. Do

1 you know whether right now you can listen to  
2 AOL Radio on a wireless device?

3 A I didn't test it recently.

4 Q So you're aware that Yahoo and AOL  
5 are actually the two top-rated webcasters in  
6 the U.S., correct?

7 A Could be, sure.

8 Q And so why was it that you didn't  
9 -- as part of your test here for the Board,  
10 attempt to listen to the top two rated  
11 webcasters in the country?

12 A Those were the ones pre-installed  
13 on the device, I used them. Because if you  
14 had to install a different thing in order to  
15 make it work, I suppose you would have said  
16 well, boy, you did some programming to make  
17 that happen, didn't you?

18 And so my goal was to show that  
19 out of the box, these devices can do this.

20 Q Now are you aware that Launchcast  
21 only works on machines that have a Windows  
22 Media Player installed and either Internet

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1 Explorer or Netscape 7.1?

2 A If that's your statement, I'd have  
3 to test it. I don't know if what you've just  
4 said is true.

5 Q Okay, assume it's true for my next  
6 question. If that's true, that would rule out  
7 being able to listen to Yahoo Launchcast on  
8 your Nokia devices, right?

9 A No, it wouldn't.

10 Q Those don't have --

11 A That you could not run the  
12 underlying software that Yahoo provides does  
13 not mean that you could not take the URL that  
14 is generated and put it into another device  
15 and listen to that same stream. It just means  
16 that it would have a different level of  
17 convenience associated with it.

18 Q But you didn't try that?

19 A I didn't try that, no.

20 Q Now you quote a study from IDC on  
21 page 21 of your statement. You actually quote  
22 an article from a Jack Loechner, I'm sorry,

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1 you quote an article from -- well, let's take  
2 a look at 228, actually, and let's see what it  
3 is exactly.

4 A Where do you want me to go?

5 Q Exhibit 228.

6 A 228, okay.

7 Q Now this is an article by Mr.  
8 Loechner discussing an IDC study, is that  
9 right?

10 A I believe that's right, yes.

11 Q And you haven't seen that study  
12 itself, correct?

13 A I don't have it.

14 Q Now in your description of Mr.  
15 Loechner's article on page 21 of your  
16 statement

17 --

18 A Yes.

19 Q You say that he predicted that  
20 mobile music will exceed on-line music within  
21 five years.

22 A Yes.

1 Q Correct?

2 A Yes.

3 Q Now you don't know whether mobile  
4 music that's discussed in this IDC study  
5 includes webcasting or not, is that correct?

6 A I don't know if it includes  
7 webcasting, no.

8 Q In fact, this study, the IDC study  
9 was actually about four track downloads and  
10 not webcasting, isn't that right?

11 A I don't know that to be true.  
12 That's what you're saying. I guess I'd be  
13 curious as to the proof, but I saw it as  
14 general mobile music use.

15 I mean, if you were correct, by  
16 the way, the notion of a broadband wireless  
17 network would be less useful, so it's  
18 mentioned here sort of suggests that you're  
19 not accurate in your characterization of it.

20 Q I don't think I asked a question,  
21 Mr. Griffin.

22 A Oh, okay.

1 (Pause.)

2 Q I'm going to pass out two exhibits  
3 labeled 9 and 10.

4 (Whereupon, the above-  
5 referred to documents  
6 were marked as Services  
7 Exhibit 9 and Services  
8 Exhibit 10 for  
9 identification.)

10 (Pause.)

11 Mr. Griffin, you said you actually  
12 didn't look at the IDC study, correct?

13 A Right.

14 Q You looked at Mr. Loechner's  
15 description of the IDC study.

16 A Right.

17 Q Now what I've handed out, Exhibits  
18 9 and 10, are some printouts from the IDC  
19 website.

20 A I see them.

21 Q If you could take a look at 9, do  
22 you recognize this as a press release from the



1 IDC website?

2 A It appears to be.

3 Q Okay. Could you turn to page 2 of  
4 Exhibit 9?

5 A Yes.

6 Q The last paragraph.

7 A I'm there.

8 Q It says "this IDC study, U.S.  
9 Wireless Music 2006 to 2010" etcetera,  
10 etcetera, "provides an analysis and forecast  
11 of the U.S. wireless music service provider  
12 market, specifically the market for the over-  
13 the-air delivery of four track songs."

14 Do you see that?

15 A I see it.

16 Q Sir, does that suggest that the  
17 study is, in fact, about downloads of songs  
18 and not about webcasting?

19 A I would say that it says that  
20 that's purely true because the iTunes store  
21 itself offers webcasting built into the  
22 software. And of course, this article stands

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1 for the proposition that you pay double for  
2 mobile music, that when it's untethered, \$2 is  
3 the right price point.

4 Q My question, Mr. Griffin, is where  
5 in here do you see anything about this study  
6 having to do with webcasting?

7 A I don't think I said that. I  
8 think I said that people expect their music to  
9 be mobile. And that we believe that mobile  
10 music users are going to grow dramatically.  
11 I think that's what I used it to cite.

12 Q So it's not intended to suggest  
13 that the measurements in here apply to  
14 webcasting?

15 A They applied to webcasting and to  
16 downloads and to how people expect to use  
17 their music.

18 Q And my question is where in here  
19 do you see anything suggesting that this  
20 survey or study covers webcasting and not as  
21 it says here over-the-air delivery of four  
22 track songs?

1           A     An example is that it refers to  
2 music services. Music services are typically,  
3 for example, a webcast as a product, would be  
4 something different, but the idea that people  
5 expect either their services or their products  
6 to be available on their mobile device is the  
7 proposition that it was used to support and I  
8 think it still does. And in fact, I think it  
9 supports it even more by pointing out that  
10 people are willing to pay double when it's  
11 available on a mobile device.

12           Q     And that's double for a download,  
13 correct, not for webcasting?

14           A     For the download. It points out  
15 that they're willing to pay twice as much to  
16 have it in a mobile format as they would not  
17 to. I think that supports the notion that  
18 people want their music to be mobile.

19           Q     And again, there's nothing in  
20 there though apart from a reference to music  
21 services that leads you to believe that this  
22 study has anything to do with webcasting,

1 right?

2 A I think it has to do with both. I  
3 think this is how people want to get their  
4 music, whether it's downloaded, streamed,  
5 whatever. They would like it to be with them  
6 as opposed to at home.

7 MR. LARSON: It's 12:30. This  
8 would probably be a good breaking point or I  
9 can keep going, whatever the Board would like.

10 CHIEF JUDGE SLEDGE: We will  
11 recess until 2 o'clock.

12 MR. LARSON: Your Honor, I wonder  
13 if it's possible, given the holiday and  
14 flights out tonight for the holiday, if we  
15 could perhaps take an hour for lunch rather  
16 than an hour and a half today to keep us  
17 moving?

18 CHIEF JUDGE SLEDGE: Mr. Griffin  
19 is scheduled for a partial day of testimony in  
20 any event, and our time during this break is  
21 always completely filled without any excess  
22 time.

1 MR. LARSON: When you say a  
2 partial day of testimony, are we stopping  
3 early today?

4 CHIEF JUDGE SLEDGE: It was  
5 represented yesterday by all the parties that  
6 he would not be a full-day of testifying, that  
7 we would only need a partial day to give his  
8 testimony.

9 MR. LARSON: Okay.

10 CHIEF JUDGE SLEDGE: To which we  
11 intend to hold you.

12 (Whereupon, at 12:36 p.m., the  
13 hearing was recessed, to reconvene at 2:00  
14 p.m.)

15 CROSS EXAMINATION (CONTINUED)

16 BY MR. LARSON:

17 Q Mr. Griffin, just a few more  
18 questions that I have for you. You testified  
19 earlier this morning about WiMax and Sprint's  
20 offering of WiMax, do you recall that?

21 A That's right.

22 Q Now that was -- that Sprint

1 service was just announced, correct?

2 A That's right.

3 Q And it's not yet available?

4 A I don't know. I'm not from  
5 Sprint.

6 Q Right, and it's not clear exactly  
7 when it will be available, correct?

8 A It's a rollout they're planning to  
9 do soon, but you're right. You can't lay that  
10 down in a concrete timetable where and when  
11 yet.

12 Q And on page 23 in the article you  
13 quote, it says Sprint expects to invest a  
14 billion in 2007 and between \$1.5 and \$2  
15 billion 2008?

16 A Right.

17 Q But no indication of when it will  
18 actually be live for consumers?

19 A Well, it won't be just one thing,  
20 so it will go live in a city first, so you  
21 wouldn't say oh, you have to complete the  
22 whole nationwide network before you turned it

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1 on. It would be a priority schedule of which  
2 cities it will come to first.

3 Q Now when you discuss cellular, on  
4 page 24 of your statement, you quote an  
5 article by Amy Gilroy discussing the study by  
6 The Yankee Group?f

7 A Yes.

8 Q You didn't review that study or  
9 produce it in this proceeding, correct?

10 A No, I did not.

11 Q Okay. Now if you could turn to  
12 page 26.

13 A I'm there.

14 Q You mentioned down under the other  
15 technology section in the middle of the  
16 Bluetooth paragraph?

17 A Yes.

18 Q That you could use your hand-held  
19 device to listen to Internet streams in your  
20 vehicle?

21 A That you can, yes.

22 Q You can, right. I just want to

1 talk about what would be involved in actually  
2 doing that.

3 In order to do this, you would  
4 need to purchase a hand-held portable device  
5 capable of receiving webcasts, correct?

6 A Yes.

7 Q And those are often in the range  
8 of \$200 or \$300?

9 A It can be, although again, there's  
10 a subsidy element with cellular companies.

11 Q Right.

12 A So you -- even though they may  
13 cost \$200 to \$300, they may offer them to you  
14 at a lower price in return for a two-year  
15 commitment.

16 Q So you're paying one way or the  
17 other?

18 A Oh, to be sure. Yes.

19 Q And the Nokia 770 that you  
20 discussed, I think you said that retails for  
21 around \$300?

22 A No, that's \$199 right now. I

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1 believe that's right. I could be off by a  
2 little bit, but I think it's around \$199 now.

3 Q So when you wrote your testimony,  
4 it was \$300?

5 A It might have been higher then,  
6 yes.

7 Q And to receive a webcast on this  
8 portable device, you'd have to purchase a  
9 subscription from the cellular company to get  
10 internet access, correct?

11 A On which device?

12 Q On any device.

13 A On any device, you would need to  
14 be subscribing, yes, to cellular service.

15 Q Right, in order to --

16 A I just meant to differentiate so  
17 that it wasn't confusing, that the 770 is not  
18 a cellular service.

19 Q Got you. No, I didn't mean the  
20 770, in particular.

21 So in your car, you would have a  
22 device and you would need to subscribe. Can

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1 you tell me what would be, what's the ballpark  
2 of the subscriptions for cellular service in  
3 terms of price?

4 A I'd say it ranges from \$30 to \$130  
5 a month in there somewhere, depending on  
6 usage.

7 Q And is it the case that there are  
8 sometimes additional data charges from the  
9 cellular company for data intensive activities  
10 like the streaming of music?

11 A It can be, although it's more  
12 common now to buy a flat-fee data  
13 subscription, if that's what you're referring  
14 to, yes. You would pay extra to get a flat-  
15 fee data subscription and you would need less  
16 minutes on your regular plan.

17 Q Now on your video that you showed  
18 when you were demonstrating the cellular  
19 listening, it appeared on the screen, and  
20 correct me if I'm wrong, that there actually  
21 was sort of a meter running showing charges  
22 that --

1           A     Are you referring to the price  
2 indicator?

3           Q     Yes.

4           A     It's an arbitrary indicator.

5           Q     Okay.

6           A     That is merely there in the event  
7 that you were trying to keep track of your  
8 usage.

9           Q     Okay.

10          A     That indicator on the software  
11 gives you an arbitrary amount, but it doesn't  
12 reflect a real amount.

13          Q     Okay.

14          A     It's merely like a relative  
15 indicator, if you were paying by the minute,  
16 and you were wanting to keep track, you would  
17 watch that, but I don't pay by the minute and  
18 so it shows up anyway, even though it's not a  
19 relevant consideration to me.

20          Q     Okay, and so you pay a higher  
21 price to get basically all you can eat?

22          A     Well, I think it's a lower price,

1 actually. I wouldn't pay a higher price for  
2 all you can eat. It actually lowers my bill.

3 Q Right.

4 A To pay for all you can eat.

5 Q Understood, right. Now so if you  
6 were using this again to -- to go back to our  
7 situation here of listening to it in the car,  
8 you said you would have to buy the device.  
9 You'd have to subscribe to the cellular  
10 service.

11 A Yes, those would likely be  
12 coterminous events. Most people buy their  
13 device from their cellular subscriber and it  
14 comes with a subscription because that's a  
15 fundamental part of economics.

16 Q And then you would need to  
17 establish a connection to the Internet through  
18 that cell phone, correct, or cell device?

19 A That should -- with the proper  
20 device, it's probably enabled to do that from  
21 the beginning.

22 Q Okay. And then you'd have to tune

1 in a webcasting station that's actually  
2 accessible on a particular device, correct?

3 A I think the word "tune" is a  
4 little unusual in this context because it  
5 brings to mind someone at a shortwave dial,  
6 listening to static, in fact, it's a  
7 preprogrammed selection that's roughly as easy  
8 as using a cable TV.

9 Q Okay. And then from that point  
10 you would transmit the signal from the device  
11 over to the car radio vehicle --

12 A If you were going to use  
13 Bluetooth, right. Those devices would use --  
14 using a term that's associated with them, they  
15 would pair themselves. And the first time you  
16 paired them, you would tell them to trust one  
17 another and then thereafter, they would  
18 automatically pair themselves and trust one  
19 another.

20 Q And now by comparison, if you were  
21 going to listen to an AM or FM station on your  
22 car radio, you would tune it in and listen for

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1 free, correct?

2 A Well, again, "tune" is a funny  
3 word. You punch a button, yes.

4 Q You punch a button and you would  
5 listen for free, correct?

6 A If it were terrestrial radio. If  
7 you were listening to satellite radio, as many  
8 people do, you -- it would not be free.

9 Q I'm not asking about satellite --

10 A You said radio.

11 Q Terrestrial radio.

12 A Oh, if it's terrestrial radio,  
13 then you would probably not be paying any kind  
14 of charge, although if it were public radio,  
15 they'd guilt you into paying, I suppose at  
16 some point.

17 MR. LARSON: Your Honor, I move to  
18 strike the last comment about Public Radio.  
19 It's nonresponsive to my question.

20 CHIEF JUDGE SLEDGE: I bet you  
21 want to join that.

22 MR. TAYLOR: It is fairly

1 gratuitous.

2 CHIEF JUDGE SLEDGE: That 10  
3 seconds is taken off your time, Mr. Larson.  
4 Granted.

5 MR. LARSON: I only have a couple  
6 more questions. I'm sorry, is the motion  
7 granted?

8 CHIEF JUDGE SLEDGE: You were  
9 talking while I gave the ruling.

10 BY MR. LARSON:

11 Q Now you mentioned, Mr. Griffin, a  
12 stream ripping program in your testimony.

13 A I did.

14 Q Web radio recorder?

15 A Yes.

16 Q You haven't provided any  
17 statistics detailing the sales of this product  
18 to consumers, have you?

19 A No.

20 Q And no statistics on the usage of  
21 this product by consumers, correct?

22 A This particular product, no.

1 Q And that's a product created by a  
2 third party, not by any webcaster, correct?

3 A That's right.

4 MR. LARSON: I have no more  
5 questions.

6 CHIEF JUDGE SLEDGE: Mr. Joseph?

7 MR. JOSEPH: Thank you, Your  
8 Honor.

9 (Pause.)

10 CROSS EXAMINATION

11 BY MR. JOSEPH:

12 Q Good afternoon, Mr. Griffin.

13 A Good afternoon.

14 Q May I ask you to turn, please, to  
15 page four of your written rebuttal testimony  
16 and there you say at the end of the first full  
17 paragraph "the number of webcasters has been  
18 sharply increased over the last three years",  
19 correct?

20 A Yes.

21 Q Do you see that?

22 A Yes.



1           Q     Let me hand you a document that  
2 was handed to you in your deposition, we're up  
3 to number nine now? Eleven. I've lost track.

4                     (Whereupon, the above-  
5 referred to document was  
6 marked as Services  
7 Exhibit 11 for  
8 identification.)

9                     (Pause.)

10           I hand you a document that  
11 actually has a sticker, Griffin Rebuttal  
12 Deposition Exhibit 2 and I would ask you if  
13 you recognize this document?

14           A     I do.

15           Q     Is this the document that you were  
16 referring to in your citation in footnote 7  
17 for information from www.brsmedia.fm?

18           A     Yes.

19           Q     Now I look at this table and I'd  
20 ask you to look at this table. By the way,  
21 before I do, do you consider BRS Media to be  
22 a reliable source of information?

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1           A       Well, I think it's a relatively  
2 reliable source of information that the  
3 industry often relies upon.

4           Q       And you thought it was  
5 sufficiently reliable to rely upon for at  
6 least this purpose in your testimony?

7           A       I thought it was a good data point  
8 to add in addition to my direct statement.

9           Q       Do you know if the radio station  
10 or the number of radio stations that are  
11 listed in this chart refer to terrestrial  
12 broadcast simulcasters or does it refer to all  
13 Internet webcasters?

14          A       All Internet webcasters.

15          Q       It also, I note, says the number  
16 of radio stations worldwide broadcasting on  
17 the web. Do you know how many of the radio  
18 stations on this chart are United States radio  
19 broadcasters?

20          A       No.

21          Q       I note that there appears to be an  
22 upturn around January of 2003. Do you see

1 that?

2 A Yes.

3 Q Was that about the time that the  
4 Small Webcasters Settlement Act was passed in  
5 the United States?

6 A Yes.

7 Q Mr. Griffin, did you get, in your  
8 testimony, concerning the number of  
9 webcasters, did you get any data from  
10 SoundExchange showing the number of services  
11 streaming in 2001, 2002, 2003, and 2004?

12 A No, I don't think I did.

13 Q Did you ask how many services were  
14 streaming in those years of SoundExchange?

15 A I don't think I asked them for  
16 that.

17 Q Well, would it be consistent with  
18 your understanding of the number of services  
19 streaming and paying the full CARP statutory  
20 rate, number of commercial services that the  
21 numbers were about 290 in 2001; 170 in 2002 --  
22 these are approximate numbers; 120 in 2003;

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1 and 130 in 2004?

2 A Again, in the abstract, I'm  
3 hearing you speak the numbers, is that  
4 consistent. I mean they weren't numbers that  
5 I cited.

6 Q Well, if you don't know -- I'm  
7 just asking you if that's consistent with your  
8 understanding. If you don't have an  
9 understanding --

10 A Well, the number increased. I  
11 would say after that settlement, yes. If  
12 that's what it highlights.

13 Q But are those numbers consistent  
14 with your understanding?

15 A Would you read them again?

16 Q Well, 290 in 2001; 170 in 2002;  
17 120 in 2003; 130 in 2004?

18 A The number of webcasters?

19 Q Number of commercial webcasters  
20 paying the full CARP rate?

21 A That's a subset of the number  
22 we're discussing, so of the commercials who

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1 are a subset, I guess I could believe the  
2 number, but I didn't break it down that way.

3 Q Now when you cited the BRS  
4 material that you included in the exhibit that  
5 we talked about, Services Rebuttal Exhibit 11,  
6 that chart, did you check and review the BRS  
7 website for other relevant information?

8 A I mean I did check the BRS website  
9 for other relevant information. I don't  
10 recall what I found there at the time. I was  
11 looking for a statistic that I thought related  
12 to the general flow of how many webcasters  
13 there were and I chose this one. But there  
14 may well have been other information there.

15 I didn't directly see anything  
16 that contradicted this.

17 Q Did you see an article dated  
18 September 12, 2002 entitled "BRS Media's Web  
19 Radio Reports a Steep Decline in the Number of  
20 Stations Webcasting"?

21 A I didn't see that article.

22 Q Let me show it to you.

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1 A Sure.

2 (Pause.)

3 Q I'm showing you a document now,  
4 Mr. Griffin, identified as Services Rebuttal  
5 Exhibit 12.

6 (Whereupon, the above-  
7 referred to document was  
8 marked as Services R-12  
9 for identification.)

10 A Thank you.

11 (Pause.)

12 Q Mr. Griffin, do you see that this  
13 article reports that the numbers indicate that  
14 the current copyright prices as having a  
15 direct impact on the number of stations  
16 broadcasting on line, in the first paragraph?

17 A Where do you want to refer me to?

18 Q In the first paragraph just about  
19 the middle of the first paragraph?

20 A That's what it says.

21 Q Is that consistent with your  
22 understanding of what was happening around

1 September 12, 2002?

2 A That there were less stations  
3 broadcasting?

4 Q That the current copyright price  
5 was having a direct impact on the number of  
6 stations broadcasting online?

7 A Yes, that there were less stations  
8 because of that.

9 Q And if you take a look at the next  
10 paragraph where it says "prompted by the  
11 current copyright issue well over one thousand  
12 U.S. stations quit broadcasting online." Is  
13 that consistent with your understanding?

14 A It wouldn't surprise me.

15 Q Now Mr. Griffin, in footnote eight  
16 on page four, it appears that you attempt to  
17 contrast webcasting with the record companies  
18 and say the record companies are facing  
19 declining CD sales. Do you see that?

20 A Yes.

21 Q Now you cite a research report  
22 there on the Warner Music Group from Citigroup

1 as evidence, correct?

2 A Well, from CitiBank. Citigroup  
3 Research, yes.

4 Q Warner Music Group is a publicly  
5 traded company, correct?

6 A Right.

7 Q Does Warner Music Group issue  
8 quarterly financial reports under the  
9 securities laws that are sometimes referred to  
10 as 10Q?

11 A Sure.

12 Q As an expert following the  
13 industry, and making assertions about the  
14 financial situation of Warner Music Group,  
15 you've looked at those SEC filings, wouldn't  
16 you?

17 A I do look at that, but I don't  
18 think I make assertions about their financial  
19 viability. I did say that they're facing  
20 declining CD sales, but I don't think that has  
21 to do with their overall financial picture.  
22 That's part of it, of course. That would be

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1 one factor that would affect them.

2 Q And would you expect discussion of  
3 declining CD sales or not lack of declining  
4 sales to be discussed in a 10Q?

5 A Not necessarily. It could be a  
6 factor, but absent some kind of change, it  
7 might not be brought up.

8 Q Let me hand you the most recent  
9 10Q for Warner Music Group. We've marked it  
10 as Services Exhibit -- Rebuttal Exhibit 13.

11 (Whereupon, the above-  
12 referred to document was  
13 marked as Services R-13  
14 for identification.)

15 (Pause.)

16 Let me ask, have you seen this  
17 document before?

18 A This particular document?

19 Q The 10Q for the period ending June  
20 30, 2006?

21 A I can't recall if I looked at this  
22 one exactly, but I do look at the 10Q

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1 statements of media companies regularly.

2 Q And this would have been issued  
3 before you submitted your written rebuttal  
4 testimony in this case, correct?

5 A I think that's right.

6 Q Let me ask you to look at page 41,  
7 please.

8 Do you see the bottom of the page  
9 where it speaks of recorded music?

10 A Yes.

11 Q It says "recorded music revenues  
12 increased by \$90 million or 15 percent to \$678  
13 million for the three months ended June 2006  
14 from the same period last year"?

15 A I see that.

16 Q And do you see that it also says  
17 it was driven by an increase of digital sales  
18 of approximately \$50 million and an increase  
19 in physical sales of \$44 -- and I believe  
20 you'll find "million" on the next page?

21 A Okay, yes.

22 Q Do you understand an increase in

1 physical sales to refer to CDs?

2 A Well, yes, worldwide.

3 Q And it's your understanding that  
4 the worldwide physical sales of Warner Music  
5 Group at least increased in the most recent  
6 three-month period year over year?

7 A It's a cyclical business. Tower  
8 Records just closed. I mean let's face it.  
9 CD sales are declining. This is the Warner  
10 10Q for one quarter reference any world sales.  
11 This doesn't refute --

12 Q I'm sorry, I didn't ask that  
13 question. I asked whether you agree that this  
14 reflected an increase year over year for that  
15 quarter, the quarter ending June 30th in  
16 Warner Music Group?

17 A In revenue amounts, yes.

18 Q Now actually you cite the  
19 Citigroup Report from September 22, 2005,  
20 correct?

21 A Yes.

22 Q Your assertion?

1 A Yes.

2 Q In fact, you sponsor it as an  
3 exhibit, right?

4 A That's right.

5 Q Okay. Are you aware of the target  
6 price set by Citigroup for Warner Music Group  
7 -- the target price that Citigroup set on  
8 September 22, 2005 for Warner Music Group?

9 A I don't recall it.

10 Q Why don't you take a look at the  
11 exhibit. It's SX-24RR.

12 JUDGE ROBERTS: Where are you, Mr.  
13 Joseph?

14 MR. JOSEPH: SX24RR. It's in the  
15 binder, Your Honor.

16 (Pause.)

17 THE WITNESS: Were you directing  
18 my attention somewhere in this document?

19 BY MR. JOSEPH:

20 Q Yes, I direct your attention to  
21 the

22 -- well, I'll direct your attention to the

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1 front page, upper right hand corner?

2 A Yes.

3 Q See where it says "price 1797  
4 target \$18?"

5 A I see that.

6 Q Do you have an understanding of  
7 what Citigroup meant when they said "target"?

8 A Sure, they think it will go up  
9 three cents.

10 Q In what period of time, do you  
11 know?

12 A I don't know the period of time.

13 Q Do you know what period of time  
14 analysts usually provide target prices for  
15 when they issue financial reports?

16 A I guess the next quarter, perhaps  
17 the next year.

18 I don't know this particular one,  
19 what date it sets as the target.

20 Q Before you cited it as an exhibit  
21 and sponsored as an exhibit, did you review  
22 this document?

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1           A     I reviewed it towards the  
2 different proposition.

3           Q     So you didn't notice what the  
4 target price meant?

5           A     The target price was not relevant  
6 to me.

7           Q     Do you happen to know what Warner  
8 Music Group's stock is trading, what it closed  
9 at last night?

10          A     Don't know what it closed at last  
11 night.

12          Q     Do you follow the stocks of the  
13 media companies that you describe?

14          A     I review it on occasion.

15          Q     Excuse me. Have you reviewed  
16 other analysts' reports on the Warner Music  
17 Group?

18          A     On Warner Music Group? I reviewed  
19 them in the past. I don't recall them at the  
20 moment.

21          Q     Would it be fair to say that  
22 Citigroup is the most pessimistic of the

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1 analysts that are covering Warner Music Group?

2 A I wouldn't be a good guy to give  
3 you a relative read of which was the most  
4 pessimistic and which was the most optimistic.

5 Q In following, to the extent that  
6 you do follow stock prices and financial  
7 information about media companies in the  
8 United States, do you use any internet portals  
9 or sources to follow that information?

10 A I think I review it as I look at  
11 it. Sometimes I sit down and I go and I  
12 research and make a little note to myself  
13 about what is happening.

14 Q Have you used Yahoo's finance  
15 pages?

16 A Oh, I've used those. Sure.

17 Q Do you consider them reliable  
18 sources?

19 A Oh, yes. Most of it is relatively  
20 from the same source.

21 Q Let me hand you a document we have  
22 marked as Services Ex R-14, which I will

1 represent was printed from the Yahoo finance  
2 page regarding Warner Music Group last May.

3 (Whereupon, the above-  
4 referred to document was  
5 marked as Services R-14  
6 for identification.)

7 A Okay.

8 Q Right next to the words in the  
9 bold print Warner Music Group, do you see at  
10 4 PM Eastern Time 26.27?

11 A I do.

12 Q Do you understand that to be the  
13 closing price last night of the stock?

14 A Sure, I believe that.

15 Q And if you take a look at the next  
16 page where there are analysts, the summary of  
17 analysts' recommendations for current month?

18 A I see it.

19 Q You see that? Three analysts rate  
20 the stock as a buy?

21 A Right.

22 Q Eight rate it as a hold?



1 A Sure.

2 Q One rates it as a strong sell?

3 A Okay.

4 Q And if you look just above that,  
5 you'll see that on 8 May 06 Citigroup issued  
6 a sell recommendation on the stock, right?

7 A I see that.

8 Q So based on this, at least, it  
9 appears, does it not, that Citigroup is the  
10 most pessimistic of the analysts following  
11 Warner Music Group?

12 A Based on this, sure.

13 CHIEF JUDGE SLEDGE: Mr. Joseph, I  
14 don't believe that you have gotten anything  
15 into evidence yet. I encourage you to move  
16 onto something that can be evidence.

17 MR. JOSEPH: Your Honor, I have  
18 his testimony.

19 CHIEF JUDGE SLEDGE: But he's only  
20 read documents you gave him that haven't been  
21 admitted into evidence that he has no  
22 familiarity with.

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1 MR. JOSEPH: Actually, Your Honor,  
2 I certainly don't want to argue with Your  
3 Honor, but my understanding was with respect  
4 to BRS he said it was a reliable source that  
5 he relies upon, that the material in this  
6 article was consistent with his understanding,  
7 that that was particular cable that he used.

8 CHIEF JUDGE SLEDGE: He had one  
9 point there that was in evidence. He said  
10 that there was an upturn in the number of  
11 internet users at about the same time as the  
12 Small Webcaster Act passed. That was the one  
13 part of evidence that came in.

14 MR. JOSEPH: And he also, I  
15 believe, Your Honor, said that this table that  
16 he was relying on for a number of webcasters  
17 was world wide webcasters, instead of the  
18 United States webcasters.

19 CHIEF JUDGE SLEDGE: That does not  
20 effect anything that is in his statement.  
21 That does not add anything to his testimony.

22 MR. JOSEPH: You don't believe it

1 goes to his credibility? I'm not going to  
2 argue here, Your Honor.

3 BY MR. JOSEPH:

4 Q Mr. Griffin, on page 11 of your  
5 testimony, you quote an article discussing  
6 Clear Channel making a radio station available  
7 for streaming on Cingular cell phones. Do you  
8 see that?

9 A Yes, I see that.

10 Q Now it appears in that article  
11 that you have ellipses in the middle of the  
12 paragraph after the word Cingular. Did you  
13 cut out a statement that the service allows  
14 users to find song titles and artist names for  
15 recent songs?

16 A Sure, that might have been part of  
17 it. Sure.

18 Q And did you cut out statements  
19 that actually described other features  
20 available on the service?

21 A Very well may have.

22 Q Did you cut out a statement that

1 the service will offer a little in the way of  
2 web surfing functionalities because so doing  
3 would limit the number of funds on which the  
4 application would work?

5 A I don't recall that. But I may  
6 well have cut that out.

7 Q I'll now hand you a document  
8 marked Services Rebuttal Exhibit 15.

9 (Whereupon, the above-  
10 referred to document was  
11 marked as Services  
12 Exhibit 15 for  
13 identification.)

14 Is this the article you were  
15 quoting?

16 A Yes.

17 Q I'd offer this Services Rebuttal  
18 15 into evidence, Your Honor.

19 CHIEF JUDGE SLEDGE: Any objection  
20 to Exhibit 15?

21 MR. HANDZO: Only that I think  
22 it's redundant, Your Honor. I believe it's

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1 already attached to his statement.

2 CHIEF JUDGE SLEDGE: I was looking  
3 at 220 and I didn't see it when I quickly when  
4 through there. Is it attached in 220?

5 MR. JOSEPH: If it is, I'll  
6 certainly withdraw the offer and apologize.  
7 Let me check.

8 CHIEF JUDGE SLEDGE: 220 is cited  
9 for that quote in his statement, so that's  
10 where I assume it would be.

11 I don't see it, Mr. Handzo. Is it  
12 in there

13 MR. HANDZO: If I can just take a  
14 look, Your Honor.

15 (Pause.)

16 JUDGE ROBERTS: 220 is the RAIN  
17 article?

18 MR. HANDZO: Yes.

19 (Pause.)

20 MR. HANDZO: It may be that it was  
21 just the RAIN article, so I withdraw the  
22 objection.

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1 MR. JOSEPH: Your Honor, actually  
2 as I read it, Mr.s Handzo, as I review it, the  
3 footnote 20 as opposed to Exhibit 220 refers  
4 to the blocked quote, Mr. Griffin, is that  
5 correct?

6 THE WITNESS: Right, yes.

7 BY MR. JOSEPH:

8 Q X220 refers to the next sentence,  
9 correct?

10 A Yes, that's right.

11 MR. JOSEPH: In that case, I'd  
12 offer it into evidence.

13 CHIEF JUDGE SLEDGE: With no  
14 objections, it's admitted.

15 (The document, having  
16 been marked previously  
17 for identification as  
18 Services Exhibit R-15,  
19 was received in  
20 evidence.)

21 BY MR. JOSEPH:

22 Q Now Mr. Griffin, by the fact that

1 you've included this service in your testimony  
2 or discussion of this service in your  
3 testimony, is it your intent to communicate to  
4 the Court that this is a commercially-  
5 significant service that's being offered and  
6 it presents a decent experience to the user?

7 A No.

8 Q In fact, do you have an opinion on  
9 the quality of the user experience with the  
10 service?

11 A I don't know. They had just  
12 announced it and there weren't any results  
13 yet.

14 Q Have you, yourself, tried the  
15 service?

16 A I have not.

17 Q Did you talk with the author of  
18 the article, Mr. Sass?

19 A No, I did not.

20 Q Did you discuss the service with  
21 anyone at Z100?

22 A No, I did not.

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1 Q Did you discuss the service with  
2 anyone at Clear Channel?

3 A No, I didn't discuss it with  
4 anyone at Clear Channel.

5 Q Did you discuss the service with  
6 anyone at Cingular?

7 A No, I don't recall talking to  
8 anyone at Cingular about it.

9 Q So you're relying for all of the  
10 information that you present about that  
11 service on the published article, two  
12 published articles you found in the literature  
13 search?

14 A Well, it's you who says that I  
15 offered it in support of many things. I don't  
16 think I did. I offered this to point out that  
17 Clear Channel now believes in the technology  
18 and is moving forward with one station and  
19 said that they plan to go to more. That's all  
20 I offered it in support of. And that's what  
21 the article says.

22 Q And that wasn't the question I

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1 asked, Mr. Griffin.

2 A Oh, okay.

3 Q The question I asked was were you  
4 relying on all of your information about this  
5 service on two published articles that you  
6 found in the literature search?

7 A Yes, it was very new.

8 Q Now the excerpt you posed is a  
9 little unclear. Is it your understanding that  
10 the \$299 subscription fee includes all of the  
11 features except simulcast streaming, and that  
12 streaming is an extra 99 cents?

13 A I'm not certain what features  
14 they're offering for the \$299, just that they  
15 believe that it's time to offer a service that  
16 goes to cellular phones that streams their  
17 radio station and that they're going to charge  
18 a fee for that and I quoted what I could out  
19 of the article.

20 Q Are you aware of any other radio  
21 broadcast stations that are marketing a  
22 service specifically designed for cell phones?

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1           A       I don't know of one that's saying  
2           oh, you should only listen to this on your  
3           cell phone, no. They offer it as a broadcast  
4           offering that includes cell phones.

5           Q       Now are you aware, sir, that the  
6           streaming part of these Z100 Cingular service  
7           has been terminated?

8           A       I didn't know that, no, certainly  
9           when I put this in, no.

10          Q       Have you been to the Z100 website  
11          lately?

12          A       Not lately, no.

13          Q       Did you go to the Z100 website  
14          before you testified about this particular  
15          service?

16          A       Yes, when I looked at this I did.

17          Q       And you would consider as an  
18          expert the Z100 website to be a useful place  
19          to find information about a mobile service  
20          from Z100?

21          A       Not necessarily. I've spent  
22          enough time in the radio business to know that

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1 sometimes you'll find those things and  
2 sometimes you won't.

3 Q But you did look at the page that  
4 describes the Cingular mobile service before  
5 testifying about it?

6 A I don't recall if I looked at that  
7 specific page, no.

8 Q Let me ask you to take a look at  
9 the mobile streaming page from the Z100  
10 website and see if this refreshes your  
11 recollection as to whether you actually did  
12 look at this.

13 A Which page is this?

14 Q The mobile streaming page from the  
15 Z100 website. I'll hand it to you in a  
16 second.

17 A Oh, very good.

18 (Pause.)

19 Q I hand you a document we've marked  
20 as Services Rebuttal Exhibit 16, which I'll  
21 represent was printed from the Z100 website on  
22 -- today is Wednesday, it would be Monday.

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1 (Whereupon, the above-  
2 referred to document was  
3 marked as Services  
4 Exhibit R-16 for  
5 identification.)

6 Mr. Griffin, does this refresh  
7 your recollection of whether you've actually  
8 ever been to the Z100 mobile website?

9 A No, not really.

10 Q So you can't say whether you have  
11 or you haven't?

12 A Oh no, I know I went there, but I  
13 can't say that this is what I saw. I don't  
14 recall if this is what I saw.

15 Q Looking at this -- I'll withdraw  
16 the question.

17 Mr. Griffin, let me ask you to  
18 turn to page 7 of your written rebuttal  
19 testimony. Paragraph starting "furthermore,"  
20 you discuss how radio broadcasters are  
21 simulcasting their over-the-air HD radio  
22 broadcasts, correct?

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1 A Yes, that's right.

2 Q And when you say HD broadcasts,  
3 you're referring to digital broadcasts over  
4 the air that the FCC has approved, is that  
5 what you're referring to?

6 A Well, I don't think the FCC passes  
7 judgment on the individual broadcasts.

8 Q But on the technology?

9 A On the technology, yes.

10 Q Is it true that the first digital  
11 channel transmitted by a station over the air  
12 is a digital transmission of the primary  
13 analog content?

14 A Yes, that would typically be  
15 correct.

16 Q Then it's true, is it not, that a  
17 station may then transmit one or more  
18 additional digital channels that differ in  
19 content from the primary analog channel,  
20 correct?

21 A Well, no, I don't follow exactly  
22 your explanation of the technology. I mean

1 they could transmit a different signal with  
2 their digital signal. I mean all of them  
3 could be different, if they wished them to be.

4 Q But as a general rule what a  
5 station first does is transmit digitally its  
6 primary --its only analog channel?

7 A They would take their analog  
8 signal and they would make that their primary  
9 digital signal. They could do that. That's  
10 what most do.

11 Q That's what most do?

12 A Right.

13 Q And sometimes, some stations also  
14 transmit additional channels?

15 A That's right. Some stations  
16 choose to use that digital capacity to deliver  
17 other signals.

18 Q And I notice in your deposition  
19 you refer to those as HD2, for example. Is  
20 that a common nomenclature?

21 A I do. It's a common reference to  
22 side channels.

1           Q     Do you know how many radio  
2 stations are transmitting over-the-air HD2 or  
3 HD side channels?

4           A     I don't know the number.

5           Q     Do you know what percentage of  
6 radio broadcasters that actually transmit HD2  
7 or HD side channels are simulcast streaming  
8 those side channels or HD2 channels over the  
9 Internet?

10          A     Well, I heard a figure recently  
11 that it was 100 percent and I haven't  
12 personally verified that figure, so I can't  
13 say to you with great accuracy, but that's  
14 what I've been told, but it's difficult for me  
15 to find out because I can't geographically go  
16 to all these places and check.

17          Q     And at least as of your  
18 deposition, you hadn't heard that number and  
19 you didn't know --

20          A     I hadn't heard it at the time of  
21 my deposition.

22          Q     Now it's true, is it not, that you

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1 believe that the audience size for over-the-  
2 air HD radio could be clearly defined at  
3 between 500 and 10,000 people nationwide and  
4 you're not even certain that a thousand radios  
5 have been sold. Is that correct?

6 A Right. I mean the very upwards  
7 limit it could possibly be is 100,000 because  
8 that's the number of chips that have been  
9 sold, but I'm guessing that there's at most  
10 been 10,000 radios sold.

11 Q And you actually said in your  
12 deposition --

13 A Yes, that's what I said.

14 Q You're not even sure that a  
15 thousand radios have been sold?

16 A That's right. I'm not sure that  
17 that's happened.

18 Q Now on page 7 in the last  
19 paragraph, you posit two benefits to  
20 broadcasters from simulcasting their HD  
21 channels on the Internet, do you see that?

22 A Yes.



1           Q     The first is a way to entice  
2 listeners to sample the HD offerings and to  
3 stimulate them to purchase an HD radio, do you  
4 see that?

5           A     Now where are you referring to?

6           Q     In the paragraph marked  
7 "furthermore, they get" --

8           A     Where are you?

9           Q     Page seven, sir.

10          A     Now, I'm there.

11          Q     They get two benefits. First, it  
12 serves as a way to entice listeners to sample  
13 the HD offerings and stimulate them to  
14 purchase?

15          A     That's right.

16          Q     And second, the variety and  
17 content allows them to attract more listeners  
18 to their websites?

19          A     Yes.

20          Q     Now you have no evidence, do you  
21 that simulcast streaming of HD offerings has  
22 increased HD receiver purchases?

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1 A No, I don't have evidence of that.

2 Q In fact, you don't think it's been  
3 a successful strategy to sell HD radios  
4 because fewer of them, to your knowledge,  
5 10,000, have been sold, correct?

6 A They're much too expensive.

7 Q And have you seen or performed any  
8 analysis or studies of the relationship  
9 between streaming multiple channels and  
10 audience size?

11 A No.

12 Q And I take it you haven't  
13 performed any analyses or studies of the  
14 number of additional listeners that have been  
15 attracted to radio station websites by the  
16 presence of the additional HD channels, have  
17 you?

18 A No.

19 Q Now please take a look at the last  
20 sentence of that paragraph where you say  
21 "frequently, the broadcasters receive so much  
22 value from these two benefits that they choose

1 not to sell advertising or charge subscription  
2 fees on the HD simulcasts as their competitors  
3 do for their streams", do you see that?

4 A Yes.

5 Q Are you saying that there's a  
6 causation that broadcasters aren't saying  
7 advertising or charging subscription fees  
8 because they receive so much other value from  
9 giving listeners an opportunity to sample HD?

10 A That's what they tell me, yes.  
11 And I believe that.

12 Q Would you agree, would you not,  
13 with an audience size nationwide between 500  
14 and 10,000 advertisers aren't going to be  
15 lining up to buy advertising time on that  
16 over-the-air channel, are they?

17 A Well, it depends. I mean, if it  
18 were truly niched, they could. But of course,  
19 the difference between what actually happens  
20 and what they hope to do are different things.

21 Q Do you remember when you were  
22 asked that question during your deposition?

1 A Yes.

2 Q Take a look at page 226 of your  
3 deposition?

4 A Right, okay. Hold on. 226?

5 Q Yes, sir.

6 A I'm there.

7 Q And you were asked by Ms. Ryan, is  
8 it fair statement that if no more than 10,000  
9 people are listening to HD Radio, that the  
10 advertisers probably aren't lining up or  
11 queuing up. And you say probably not, that's  
12 right.

13 A That's right.

14 Q And you don't know how many  
15 internet listeners listen to HD simulcast, do  
16 you?

17 A No, I don't.

18 Q Have you conducted any  
19 quantitative analysis on the price a  
20 broadcaster could obtain by selling  
21 subscriptions for internet simulcast of its HD  
22 channels?

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1           A       I haven't conducted an analysis of  
2       that.

3           Q       Now sir, let's turn to page 8  
4       where you quote Evan Harrison as saying that  
5       the number one activity is, in the first  
6       paragraph?

7           A       Yes.

8           Q       On the websites is listening to  
9       live streams. Do you see that?

10          A       Yes.

11          Q       Are you representing to the Board  
12       that that is a quote from Evan Harrison is  
13       that a quote from the article?

14          A       I thought that was a quote from  
15       Evan Harrison.

16          Q       Now the next sentence, this is  
17       what draws and keeps users and reach Clear  
18       Channel advertising profits. Are you  
19       representing to the Court that that's also a  
20       conclusion to be drawn from the article?

21          A       That's a conclusion to be drawn  
22       from me.

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1 Q So you're not saying that the  
2 article says that?

3 A No, the quote ended before that.

4 Q Why don't we take a look at the  
5 article?

6 A Okay.

7 Q I'm going to hand you a document  
8 marked Services Rebuttal Exhibit 17, which  
9 bares Sound Exchange Production marks SX REB  
10 001743-45. And then there's an additional  
11 page at the end which I'll explain after.

12 (Whereupon, the above-  
13 referred to document was  
14 marked as Services  
15 Exhibit R-17 for  
16 identification.)

17 (Pause.)

18 Looking at the pages marked SX REB  
19 001744 and 001745, is this the article that  
20 you cite for the statement about number one  
21 activity, listening to live streams?

22 A Yes, I think that's right. Yes.

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1 MR. JOSEPH: And just for  
2 convenience, Your Honors, the back page is a  
3 print this version that we found to make it  
4 easier to read. That's all, because I think  
5 you will find that the pages that were  
6 produced were very difficult to read.

7 BY MR. JOSEPH:

8 Q It's true, is it not, Mr. Griffin,  
9 that that statement this is what draws and  
10 keeps users, I'm sorry. That the number one  
11 activity is listening to live streams was in  
12 fact not a quote from Evan Harrison or was  
13 rather --

14 A You're right. I erred.

15 Q And this article actually focuses  
16 on Clear Channel's video activities on its  
17 websites, doesn't it?

18 A Oh, it mentions them. Yes.

19 Q Well, in fact, isn't the purpose  
20 that it is announcing that it is expanding its  
21 online video, on demand initiatives?

22 A Yes.

1           Q     And contrary to your statement  
2     about what reaps Clear Channel advertising  
3     profits, at least this article states right  
4     after the Clear Channel quote that video has  
5     also attracted more advertising and represents  
6     the fastest growing ad segment of Clear  
7     Channel's online offerings. Doesn't it?

8           A     I believe that and I don't think  
9     they are inconsistent.

10           MR. JOSEPH: Your Honor, I would  
11     offer Services Rebuttal Ex R-17.

12           CHIEF JUDGE SLEDGE: Any  
13     objection?

14           MR. HANDZO: No objection.

15           CHIEF JUDGE SLEDGE: Without  
16     objection, it's admitted.

17                     (The document, having  
18                     been marked previously  
19                     for identification as  
20                     Services Exhibit R-17,  
21                     was received in  
22                     evidence.)

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1 BY MR. JOSEPH:

2 Q Now, Mr. Griffin, you have a  
3 couple of times mentioned consulting for CBS  
4 Radio, I believe?

5 A I did, yes.

6 Q And that relationship ended in  
7 2005, correct?

8 A It did.

9 Q Let me ask you to turn to page  
10 five. You state that in the fourth sentence  
11 in the paragraph under B, that quote "they now  
12 buy television air time and expense their  
13 proposition to persuade listeners to stream  
14 during the work day." Do you see that?

15 A Yes.

16 Q And you actually cite two ads in  
17 your testimony in support of that statement?

18 A I do.

19 Q You're not aware of any other  
20 examples of broadcasters buying television air  
21 time to promote streaming during the work day,  
22 are you?

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1           A     Off the top of my head, I couldn't  
2 name them. But it's certainly not unique.  
3 I've heard others talk about it and say they  
4 do it and these are examples I found.

5           Q     Well, when your deposition was  
6 taken, in fact, you said "these are the ones  
7 I was aware of." Is that not true?

8           A     Right, yes.

9           Q     And you do not have any opinion on  
10 whether the purchase of television air time by  
11 simulcasters to promote at-work streaming is  
12 an uncommon or a common practice, do you?

13          A     No, it's a part of their mix.

14          Q     You do not know whether it is  
15 common or uncommon to do that, do you?

16          A     Is it common?

17          Q     Yes?

18          A     Those particular ads?

19          Q     Buying air time to promote at-work  
20 streaming?

21          A     I do not have an opinion about  
22 what percentage of their advertising it is.

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1 Q In fact, turn to page 202 of your  
2 deposition, please. Line 6.

3 A Yes.

4 Q You were asked whether you thought  
5 it was a common practice or an uncommon  
6 practice, and you said you have no opinion on  
7 its commonality, correct?

8 A That's right.

9 Q Now have you done any study or any  
10 quantitative analysis that the amount  
11 simulcasters are spending on ads to promote  
12 listening at work?

13 A No.

14 Q On page six, you say broadcasters  
15 know, this is the third sentence, that  
16 webcasting is a key to unlocking additional  
17 revenue. Have you conducted any systematic  
18 survey of broadcasters to determine what they  
19 know about the ability to generate additional  
20 revenue from webcasting?

21 A Not a systematic survey, no.

22 Q Have you conducted any survey or

1 systematic analysis to determine what or how  
2 many broadcasters know that "getting people to  
3 stream brings people to their website and  
4 earns them additional revenues"?

5 A No.

6 Q Have you conducted any  
7 quantitative analysis of how much advertising  
8 in revenues streaming earns broadcasters?

9 A No.

10 Q Have you conducted any survey or  
11 systematic analysis to determine what  
12 broadcasters know generally about simulcast  
13 streaming?

14 A No, no systematic analysis.

15 Q On page seven, sir, you cite a  
16 Jacobs Media Study. Do you see that right at  
17 the top?

18 A Yes, I do.

19 Q Again, there are ellipses right  
20 after the word streaming.

21 A Yes.

22 Q Did you eliminate a sentence that

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1 said some stations and broadcasting companies  
2 have shied away from providing this service  
3 because of the cost?

4 A Sure. I may well have done that.  
5 I do not recall if that would be the exact  
6 sentence I took out.

7 Q Let's see if we can refresh your  
8 recollection on that. I will believe you will  
9 find the paragraph that you were quoting on  
10 the last page of the document. You have  
11 "clearly, there is an expense associated with  
12 streaming," and then in your quote you have  
13 ellipses. The next sentence says "some  
14 stations and broadcast companies have shied  
15 away from providing this service because of  
16 the cost." Is that correct?

17 A Sure, I see that now. Yes.

18 Q Now on page seven, you also say  
19 that the broadcasters that hope nonlocal  
20 listeners will use the stations' website as  
21 their local stations. Is that correct?

22 A Hold on, I need to see where

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1 you're referring to.

2 Q And I do actually too. It is  
3 function of trying to move too fast. It is  
4 the second sentence after the block quote.

5 A Okay, now I see it.

6 Q The broadcasters said that these  
7 listeners, and I was correct in referring to  
8 these listeners to mean nonlocal listeners,  
9 correct? In the context?

10 A Yes. By the way, it does not mean  
11 nonlocal.

12 Q Well, the prior sentence refers to  
13 listeners outside of the bounds of --

14 A That is right. Inside buildings.

15 Q And you considered that to be  
16 outside of the bounds of the local --

17 A Yes, that's right.

18 Q Okay. Have you conducted any  
19 survey or systematic analysis of how many  
20 broadcasters are using simulcast streaming to  
21 seek nonlocal listeners?

22 A No.

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1 Q By the way, have you done any  
2 analysis of the mix between local and nonlocal  
3 advertising dollars received by simulcasters?

4 A No.

5 Q On page eight, sir, you refer to  
6 the Jack and other similar formats. Do you  
7 remember that?

8 A Yes.

9 Q Is it true that that format is  
10 sometimes called adult hits?

11 A It could be called that. Sure.

12 Q By industry sources that report on  
13 radio formats, do you know what that format is  
14 commonly called? The generic term?

15 A You might call it adult hits. You  
16 could call it Jack. There are a number of  
17 things you could call it.

18 Q Do you know how many radio  
19 stations currently play the Jack or similar  
20 formats?

21 A I do not know the number.

22 Q Now you mentioned -- I won't go

1           there. We will try to move faster.

2                       On page 11, sir, you talk about  
3           the similarity and the way simulcasters and  
4           internet-only webcasters sell advertising. Do  
5           you see that?

6           A       Where is the reference that you  
7           are making?

8           Q       It's actually page 11 carrying  
9           over to 12.       "Nothing exemplifies the  
10          convergence more than the similarity"?

11          A       Yes.

12          Q       And you refer to Ronning Lipset  
13          Radio, correct?

14          A       As an example. Yes, that's right.

15          Q       Do you know what percentage of  
16          AOL, Yahoo, MSNs, or Live 365's webcast  
17          advertising is sold is Ronning Lipset?

18          A       No.

19          Q       Do you know what percentage of  
20          Clear Channel's simulcast advertising is sold  
21          by Ronning Lipset?

22          A       No.

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1 Q Do know what type of advertising  
2 RLR, Ronning Lipset Radio, sells for Clear  
3 Channel?

4 A I don't know specifically what  
5 types of advertising they sell, no.

6 Q Now sir, on page 11, you assert  
7 that broadcasters with webcasts are rebranding  
8 themselves as digital media narrowcasters,  
9 fully capable of delivering video and graphics  
10 and interacting with the audience. Do you see  
11 that?

12 A Yes.

13 Q In fact, in saying that, you  
14 believe broadcasters are trying to shed  
15 simulcasting and to move to a digital  
16 streaming model or what's heard is not  
17 broadcast over AM and FM signals, over-the-air  
18 AM and FM signals, correct?

19 A No, not necessarily.

20 Q Do you remember your deposition  
21 when you were discussing the narrowcasting  
22 proposition? Turn, please, to page 268.

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1 A Sure, let's go there, 268.

2 Q Okay, and you start with line 15  
3 after you were asked about narrowcasting and  
4 you were asked whether the contents in the  
5 webcasts from different web sites is still a  
6 simulcast and you said, "it was your predicate  
7 that it was a simulcast. That's not mine."

8 A Right.

9 Q "My point is that they're going  
10 from being simulcasters to being  
11 narrowcasters. You could use the word  
12 simulcast if you want, but that is one of the  
13 things that is not their goal. Their goal is  
14 to shed that." Do you see that?

15 A Yes.

16 Q And you were then asked, "What  
17 you're talking about is a streaming model  
18 where what is heard is not a transmission of  
19 over-the-air FM or AM signals?" and your  
20 answer was, "That is their long-term goal."

21 Do you see that?

22 A Right, for the advertising, not

1 for the content. For example, everybody could  
2 hear the same songs, but people in different  
3 geographical locations could hear different  
4 ads. That would be a narrowcast, even though  
5 everybody heard the same thing, they would be  
6 getting different ads.

7 Q Well, you would agree, would you  
8 not, that video is not part of a simulcast?

9 A Right, from a radio broadcaster,  
10 that's right.

11 Q I'm not talking about radio  
12 broadcasters.

13 A Although video can be a predicate  
14 to hearing the simulcast.

15 Q Now you speak of interacting with  
16 the audience in that sentence also, on page  
17 11. Do you see that?

18 A And where is this?

19 Q Right --

20 A Yes, I see that, yes.

21 Q You would agree that the music  
22 played by radio stations is not intended to be

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1 interactive, wouldn't you?

2 A Over-the-air?

3 Q Yes, sir.

4 A Right.

5 Q And would it be fair to  
6 characterize terrestrial station as music from  
7 a few genres broadcast to large groups of  
8 people who have no way of knowing when a  
9 particular song or artist is being played on  
10 some other channel?

11 A Sure. I think that's close,  
12 although I don't know where those words are  
13 coming from.

14 Q Now terrestrial radio itself is  
15 not narrowcasting, is it?

16 A No.

17 Q And the music played on  
18 terrestrial radio is not narrowcasting, is it?

19 A No, in both cases it's broadcast,  
20 not narrowcasting.

21 Q By the way, you speak about  
22 changing ads. Are you aware of any radio

1 simulcasters today that are providing  
2 different ads to different listeners?

3 A Not at the moment, no.

4 Q And would you agree that radio  
5 simulcasts are far less narrowcasts than  
6 multi-channel, multi-genre, Internet-only  
7 webcasters?

8 A One more time?

9 Q Would you agree that radio  
10 simulcasts are far less narrowcasts, in your  
11 words, than multi-channel, multi-genre,  
12 Internet-only webcasters?

13 A Yes.

14 Q And you would agree, would you  
15 not, that terrestrial radio plays less music  
16 and less variety of music than multi-channel,  
17 multi-genre Internet-only webcasters, correct?

18 A I think that's right, yes.

19 Q And would it be accurate to  
20 characterize terrestrial radio as a music  
21 store limited to offering only the most  
22 popular and mainstream music in contrast to

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1 other services which offer all types of music?

2 A No, I won't go that far.

3 Q Well, isn't the fact that you  
4 testified precisely to that effect in your  
5 testimony submitted in the --

6 A I'm not sure what the context of  
7 it was.

8 Q I'm going to hand you a document  
9 we've marked as Services Rebuttal Exhibit 19.

10 (Whereupon, the above-  
11 referred to document was  
12 marked as Services  
13 Exhibit R-19 for  
14 identification.)

15 A Sure.

16 (Pause.)

17 Q Mr. Griffin, I'd ask you if you  
18 recognize this document?

19 A Sure.

20 Q What is it?

21 A Direct testimony that I wrote for  
22 the SDARS case.

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1 Q On behalf of SoundExchange?

2 A That's right.

3 Q And that's your signature -- turn  
4 to page 43, please. Is that your signature?

5 A Let me look. Sure.

6 Q Let me ask you to turn to page 25.

7 A I'm there.

8 Q In contrasting the music on SDARS  
9 with the music on terrestrial radio, isn't it  
10 a fact that the end of the paragraph just  
11 before "three" that you say -- it says "If  
12 someone opened a music store selling all types  
13 of music when the competition had been limited  
14 to selling only the most popular and  
15 mainstream music"?

16 A Yes.

17 Q And that was in the context of  
18 comparing terrestrial radio to the SDARS  
19 services, correct?

20 A I don't know that that's  
21 specifically the context. I would have to  
22 review this and look at it. I mean again,

1 you're asking me to take something out of a  
2 document and say oh, it represents precisely  
3 what you wish it does. I can't agree with you  
4 on that. I think -- I believe in the  
5 statement because I wrote it, but the context  
6 that it comes from and its meaning I would  
7 have to glean by reviewing it.

8 Q Well, at least for now, if you  
9 review that paragraph, does that refresh your  
10 recollection on what the context was that you  
11 were speaking of?

12 A Not sufficiently to agree to your  
13 generality.

14 Q By the way, let me ask you to turn  
15 to page 14?

16 A Yes, I'm there.

17 Q I'm sorry, the SDARS testimony?

18 A Yes.

19 Q You were questioned where certain  
20 language that I was quoting came from. If you  
21 look right under greater functionality, the  
22 music played by -- see where you said the

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1 music played by radio stations is not intended  
2 to be interactive?

3 A Right, it's not intended to be  
4 interactive.

5 Q And those were actually your words  
6 in your SDARS testimony, correct?

7 A Yes, it's not intended to be  
8 interactive.

9 CHIEF JUDGE SLEDGE: Mr. Joseph,  
10 that strikes me as a curious and narrow  
11 question and answer. Interactive in the  
12 context of statutory licenses, perhaps, but  
13 certainly not interactive in the context of  
14 the definition of that word.

15 Isn't the goal of broadcasting to  
16 generate revenues for advertisers? And if you  
17 generate revenues for advertisers, that's a  
18 response by listeners to the radio?

19 And if they're responding  
20 favorably, isn't that an interaction to the  
21 music?

22 MR. JOSEPH: I was simply asking,

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1 Your Honor, the witness' use of the word in  
2 the context of his statement, but if you'd  
3 like my answer, I can certainly --

4 CHIEF JUDGE SLEDGE: If you used  
5 that phrase and gotten answers, agreeing with  
6 you on a number of questions here and it just  
7 -- it hadn't been referenced in the context of  
8 statutory licenses which I believe you may  
9 intend to be saying which is very different  
10 than other context.

11 BY MR. JOSEPH:

12 Q Mr. Griffin, when you use the term  
13 "interactive" in the context of music played  
14 by radio stations is not intended to be  
15 interactive --

16 A Is this on page 14?

17 Q On page 14.

18 A Let me go here.

19 Q Were you referring to interactive  
20 in the sense of the statutory license or  
21 interactive in a broader sense?

22 A I mean in the sense of the

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1 interactive license.

2 Q It's also true that music from  
3 SDARS is not intended to be interactive, isn't  
4 it, in the sense of the statutory license?

5 A No, I disagree with that. I mean  
6 they have functionality that tells you when  
7 certain artists are playing. They want you to  
8 turn the channel. Of course, they do. They  
9 have alerts to have you move to other  
10 channels.

11 Q I'm sorry, when you speak of in  
12 the sense of the statutory license, do you  
13 mean to the material that qualifies for the  
14 statutory license as interactive or  
15 noninteractive or do you have a different  
16 meaning in mind?

17 A I'm having trouble following where  
18 you want to go with this and where your  
19 hypotheticals are and which are your  
20 statements and which are mine.

21 MR. HANDZO: Your Honor, I'm just  
22 going to object at this point. I think we've

1       gotten way far afield of now cross examining  
2       him about what he intended in a written  
3       statement submitted in another case dealing  
4       with another set of music services. I  
5       certainly didn't have a problem with Mr.  
6       Joseph starting down this road, but at this  
7       point I think we've mined this one way more  
8       than we need to.

9                   CHIEF JUDGE SLEDGE: Overruled.

10                  BY MR. JOSEPH:

11               Q       Do you have an understanding that  
12       the statutory license that this Court is  
13       charged with setting license fees for is not  
14       available to interactive services as that term  
15       is used in the applicable statute?

16               A       As regards interaction with that  
17       one station itself or interactive overall?

18               Q       Generally, do you have an  
19       understanding about whether this Court is  
20       charged with setting rates for -- let me  
21       withdraw that and not ask it that way.

22                   Do you have an understanding of

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1 whether the term "interactive" has a meaning  
2 defined in the statute that governs the scope  
3 of the statutory license?

4 A I understand the intent of the  
5 statute, I believe.

6 Q That wasn't my question. Do you  
7 understand that the statute, in fact, contains  
8 a definition of the term "interactive" in the  
9 context of the eligibility of a service for  
10 the statutory --

11 A I believe it does.

12 Q Is that the sense in which you are  
13 using the word "interactive" in this statement  
14 that you made on page 14 of the SDARS  
15 testimony?

16 A It's a complex question that  
17 you're asking. I can answer it the best I can  
18 in the most honest way I can. It's not a yes  
19 or no. I can tell you that the station itself  
20 is not intended to be interactive, but that  
21 does not mean that the medium of webcasting is  
22 not interactive. And so when offered by a

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1 webcaster, it's in an interactive context, but  
2 the station itself is not intended to be  
3 interactive and there are a number of  
4 limitations in the act that are designed to  
5 limit the interactivity of the particular  
6 station, but it doesn't make the medium itself  
7 a webcasting or the experience of using that  
8 webcaster noninteractive.

9 MR. JOSEPH: Your Honor, I think  
10 asking this witness whether he meant the  
11 statutory definition interactive probably  
12 wouldn't be further fruitful and so I will --

13 CHIEF JUDGE SLEDGE: Thank you.

14 MR. JOSEPH: I tried.

15 BY MR. JOSEPH:

16 Q Mr. Griffin, a couple of questions  
17 about your demonstration of the WiFi and  
18 cellular service, just a couple.

19 A Yes.

20 Q I think you said you like to  
21 listen to Soma FM?

22 A It is one of the kinds of music I

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1 like to listen to.

2 Q Despite the presence of the  
3 letters "FM", Soma FM is not a terrestrial  
4 simulcaster, is it?

5 A I don't think it is, no.

6 Q In fact, it's an Internet-only  
7 webcaster?

8 A I believe it is, that's right.

9 Q Have you ever been to the Soma FM  
10 website?

11 A I don't recall going there. I've  
12 chosen it off of menus.

13 Q It's true, isn't it, that Soma FM  
14 actually stopped transmitting right after the  
15 CARP fee was set back in 2002?

16 A Might have been. I still listen  
17 to Soma FM. They're still on dials and I hear  
18 music. If they stopped transmitting, it's  
19 news to me.

20 Q You're not aware of that?

21 A I actually listen. I listen so if  
22 they stopped transmitting, they have restarted

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1 transmitting.

2 Q And the fact they came back after  
3 the Small Webcaster Settlement Act was passed?

4 A I believe you if you say it. I  
5 don't know that to be true.

6 Q Okay. Now you talked about the  
7 substitution effect of mobile access to music,  
8 I believe, when Mr. Larson was cross examining  
9 you?

10 A I think I said it's a risk, yes.

11 Q Have you ever performed any  
12 consumer survey or quantitative analysis of  
13 the extent to which wireless access to non-  
14 interactive webcasting will substitute for  
15 purchases? And by non-interactive webcasting,  
16 I am meaning the webcasting that is the  
17 subject of this proceeding?

18 A No.

19 Q Have you ever examined any such  
20 consumer survey or quantitative analysis?

21 A Not that I can recall.

22 Q I believe, Mr. Griffin, one of the



1 developments in mobile access that you  
2 described briefly was broadband access in  
3 airplanes? You mentioned that --

4 A Yes, that's right.

5 Q -- has come around. And on pages  
6 28 and 29 of your testimony, you quote fairly  
7 extensively a USA Today article about WiFi on  
8 airplanes, correct?

9 A I think that's right, yes.

10 Q That's what you were referring to  
11 as one of the developments?

12 A It's one development, yes.

13 Q By the way, I notice you've cited  
14 USA Today, more than one USA Today article in  
15 your testimony. Is that one of the sources  
16 that you, as an expert, rely upon for  
17 information on the Internet and webcasting?

18 A They have very good reporters in  
19 this area, yes.

20 Q Do you review it systematically or  
21 do you just happen to see articles from time  
22 to time?

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1           A       I wouldn't say it's a systematic  
2           thing, but I know some of their reporters and  
3           I think they have good reporting in this area.

4           Q       By the way, do you consider the  
5           Times of London to be an equally reliable  
6           source of information?

7           A       It's a good source, sure.     It  
8           could be. I don't review the Times of London  
9           regularly, so I can't really opine on its  
10          quality in this area.

11          Q       Now on page 32 at the top, you  
12          discuss a Lufthansa service that you say  
13          you've personally used, is that correct?

14          A       That's right.

15          Q       Are you aware that the provider of  
16          that service to Lufthansa, the Boeing  
17          Connection Division, is shutting down that  
18          service?

19          A       Sure, and I know why and you  
20          probably don't want to hear it, which is that  
21          Jet Blue found a way to do it for a tenth of  
22          the price and so they decided this was not a

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1 fruitful thing for them to continue, knowing  
2 full well it was going to grow at a much lower  
3 price.

4 MR. JOSEPH: I'll move to strike,  
5 Your Honor. I ask him if he knew that it was  
6 being discontinued.

7 CHIEF JUDGE SLEDGE: Sustained.

8 BY MR. JOSEPH:

9 Q You were aware that, by the way,  
10 before you submitted this testimony, correct?

11 A What's that?

12 Q The termination of the connection  
13 service by Boeing?

14 A I don't recall being aware of  
15 that. I believe it was around this time.

16 Q Let me show you a London Times  
17 online article from August 17th which was more  
18 than a month before you submitted your  
19 testimony.

20 (Pause.)

21 (Whereupon, the above-  
22 referred to document was

1 marked as Services  
2 Exhibit R-20 for  
3 identification.)

4 Does this article refresh your  
5 recollection of the time that -- of when  
6 Boeing decided to terminate its connection  
7 service?

8 A No.

9 Q No?

10 A No. I was well aware that there  
11 was a new service coming.

12 (Pause.)

13 Q And it's true, is it not, that  
14 Boeing at least gives the -- no, I'll withdraw  
15 that, actually. I think the fact is good  
16 enough with that. I have no further  
17 questions.

18 CHIEF JUDGE SLEDGE: Mr. Taylor.

19 MR. TAYLOR: Your Honor, could I  
20 ask for a two-minute bathroom break? I'll run  
21 and be very quickly.

22 CHIEF JUDGE SLEDGE: Let's take

1 five minutes.

2 (Off the record.)

3 CHIEF JUDGE SLEDGE: Thank you.

4 We'll come to order.

5 CROSS EXAMINATION

6 BY MR. TAYLOR:

7 Q Good afternoon, Mr. Griffin.

8 A Hi.

9 Q I'm David Taylor for National  
10 Public Radio, if I didn't introduce myself  
11 this morning.

12 I am going to try to be very quick  
13 in light of the time and the fact that  
14 tomorrow is Thanksgiving and that the Judges  
15 did not expect to be here this long, so in  
16 light of all those things I apologize if I  
17 jump around in advance. And if you need me to  
18 repeat anything, I'll be more than happy to to  
19 keep the record clean.

20 A I'll be as quick as I can in  
21 response.

22 Q Mr. Griffin, when you worked at a

1 noncommercial broadcasting station, it was at  
2 least some 26 years ago, is that correct?

3 A Sure.

4 Q Was it some 30 years ago?

5 A It was when I was in high school,  
6 so it could well have been.

7 Q I don't mean to get into your age,  
8 exactly, but --

9 A I am 48 years old. I got no  
10 problem with that. Thirty years ago is fine.

11 Q Thirty years ago, thank you. And  
12 on page 1 of your testimony, you state that  
13 "noncommercial broadcasters like NPR are  
14 aggressively positioning themselves to exploit  
15 the revenue opportunities that webcasting  
16 offers"?

17 A Yes.

18 Q Now you stated earlier you don't  
19 know how much revenue NPR is actually  
20 garnering, is that correct?

21 A Not off the top of my head, no. I  
22 don't know right now.

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1 Q And you don't know how much NPR is  
2 earning from webcasting?

3 A Right, I don't know that.

4 Q And you can't tell us how much NPR  
5 expects to earn from webcasting in the future?

6 A No, I don't have their budget.

7 Q Turning to Exhibit 203 --

8 A I have it.

9 Q And if you -- I think it's  
10 including the front page, one, two, three,  
11 four pages through called "Selected Audience  
12 Rating Statement," take a moment to look at  
13 that page?

14 A Yes.

15 Q This information represents the  
16 station's broadcast audience, correct?

17 A That's right.

18 Q Is there any information on this  
19 page that specifically discusses the station's  
20 online audience?

21 A I don't see any.

22 Q Is there any information in this

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1 corporate underwriting kit that specifically  
2 discusses the station's online audience?

3 A Not that I recall.

4 Q Could you take a moment so that  
5 you could say yes or no?

6 A Well, if you'd like me to, I'll  
7 look through it for a little bit. I'll give  
8 you a sense of it.

9 (Pause.)

10 I don't see anything here that  
11 makes specific reference, although I will note  
12 that, for example, the final testimonial  
13 points out that it drove this particular  
14 company's website traffic higher. So perhaps  
15 that is a reference, but that is the most that  
16 I can point to for you.

17 Q But that reference doesn't say  
18 that its online audience, anything specific  
19 about its online audience?

20 A Right, it does not.

21 Q Okay. Not turning to Exhibit 214

22 --



1 A Yes, I have it.

2 Q Could you look at the last  
3 paragraph there?

4 A Yes.

5 Q It says "to learn more about  
6 business support opportunities and marketing  
7 your business or organization on WXPB contact  
8 Mike by phone at 215/573-8728 or email  
9 Business Support?

10 A Yes.

11 Q Did you contact Mike?

12 A I did not.

13 Q Did you contact anyone at WXPB?

14 A No.

15 Q So you did not verify the audience  
16 information that's here?

17 A That's right. I accepted their  
18 word. I took their word for it.

19 Q If you had contacted Mike, would  
20 you have learned that the audience profile  
21 here is for the station's broadcast audience?

22 MR. HANDZO: Objection, asking

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1 hypothetically what would have happened if he  
2 had contacted somebody.

3 CHIEF JUDGE SLEDGE: Mr. Taylor?

4 MR. TAYLOR: I will be happy to  
5 rephrase the question.

6 CHIEF JUDGE SLEDGE: All right.

7 BY MR. TAYLOR:

8 Q Based on the information here,  
9 isn't this information, the station's  
10 broadcast audience?

11 A It is.

12 Q And do you see the ad for  
13 Volkswagen there?

14 A I do.

15 Q Do you know whether or not the ad  
16 was placed there because Volkswagen sought to  
17 have an ad on this station's website?

18 A I don't know.

19 Q And so you don't know whether or  
20 not the ad was there as part of the fact that  
21 Volkswagen is indeed a corporate sponsor for  
22 the broadcast programming?

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1 A I don't know.

2 Q Turning back to page one in your  
3 written testimony, you state here "real  
4 revenues are flowing to webcasters,  
5 broadcasters, simulcasters and noncommercial  
6 webcasters like"

7 --

8 A Yes.

9 Q Do you mean to say that the  
10 revenue is flowing to each of these services  
11 as a result of webcasting?

12 A Yes.

13 Q And have you conducted any  
14 systematic survey on what NPR-member stations  
15 are earning from webcasting?

16 A No.

17 Q And can you tell me which  
18 financial stations of any NPR-member stations  
19 show revenue earned from webcasting?

20 A I don't know.

21 Q And other than the car company  
22 Accura, can you name any underwriter who have

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1 sought advertising opportunities on the  
2 websites of NPR or its member stations?

3 A I don't know. I don't know their  
4 names.

5 Q Isn't it true that Accura's  
6 interest in underwriting is limited to  
7 podcasting and not webcasting?

8 A I don't know.

9 Q Now on page 12, you allege that  
10 there is a team at NPR devoted to gleaning  
11 fully the revenues from webcasting?

12 A Yes.

13 Q Do you see that?

14 A Where are you referring me?

15 Q It's on page 12. It is towards  
16 the bottom?

17 A Yes, I'm there. I see it.

18 Q Can you tell us how many people  
19 are on this team devoted to gleaning fully the  
20 revenues from webcasting?

21 A I don't know.

22 Q And could you tell us how many

1 physicians on this team have actually been  
2 budgeted for?

3 A I don't know.

4 Q Now looking alt the first job  
5 announcement --

6 A Which page are you directing my  
7 attention?

8 Q That would probably be page 13.

9 A I'm there.

10 MR. TAYLOR: Court's indulgence.

11 (Pause.)

12 BY MR. TAYLOR:

13 Q Looking at page 13, the top, it's  
14 the web posting 1541?

15 A Yes.

16 Q When did the position close?

17 A I don't know.

18 Q Did you notice that there is no  
19 such information in the ad?

20 A It hadn't occurred to me.

21 Q Did you call to find out when the  
22 position closed?

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1 A No, I did not.

2 Q Do you know whether NPR has filled  
3 the position?

4 A I do not know.

5 Q Isn't it, in fact, true that the  
6 job was advertised, but never filled because  
7 NPR could not budget the money for the  
8 position?

9 MR. HANDZO: Objection, assumes  
10 facts not in evidence.

11 CHIEF JUDGE SLEDGE: Mr. Taylor?

12 MR. TAYLOR: I'm just asking him  
13 whether or not he knows, basically.

14 CHIEF JUDGE SLEDGE: You say  
15 "isn't it, in fact, true?" Sustained.

16 BY MR. TAYLOR:

17 Q Do you know whether or not NPR had  
18 the money to budget for the position?

19 A Did they have the money?

20 Q To budget for that position?

21 A They have enough money. There's  
22 no question about that. I know that to be

1 true.

2 Q Let me rephrase the question. Did  
3 they have money budgeted for that position?

4 A I've not seen their budget.

5 Q Do you know whether or not they  
6 have money budgeted for that position?

7 A I've not seen their budget. No, I  
8 don't know.

9 Q Thank you. Looking again at the  
10 same ad, it states "this position leads all of  
11 the operations that support revenue goals for  
12 the NPR's digital media"?

13 A Where are you directing my  
14 attention?

15 Q It's right there at the top.

16 A Oh, I see now. Okay. Go ahead.

17 Q "This positions all of the  
18 operations that support revenue goals of NPR's  
19 digital media division."

20 A I see that.

21 Q "These revenue opportunities are  
22 primarily focused on corporate sponsorship

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1 with our online and on demand products, but  
2 may also include current and future products  
3 that relate to NPR's digital media access."

4 A I see it.

5 Q "Helps invent and support  
6 sponsorship opportunities with online and on  
7 demand products."

8 A I see it.

9 Q Works closely with NPR corporate  
10 sponsorship team to develop strategic  
11 sponsorships and other revenue-generating  
12 opportunities?

13 A Yes.

14 Q Do you see the words "webcasting  
15 music" anywhere in what I just read?

16 A No. I see neither the word  
17 "webcast" nor the word "music".

18 Q In the second ad, do you see  
19 anywhere in that ad "webcasting music"?

20 A Where are you directing my  
21 attention now?

22 Q It's the bottom ad.



1 A You mean the next ad?

2 Q Yes.

3 A Yes.

4 Q It's web 1544 product manager?

5 A Yes.

6 Q Could you take a moment to take a  
7 look at it?

8 A Okay. I'll look.

9 (Pause.)

10 Okay, I've reviewed it.

11 Q Do you see anywhere in the ad the  
12 words "webcasting music"?

13 A I see neither the word "webcast"  
14 nor the word "music".

15 Q And turning the page there of your  
16 testimony on page 14, it starts in the middle  
17 of page, it is the posting web 1484?

18 A I see it.

19 Q Now this is the same ad that you  
20 discussed with Mr. Handzo at Exhibit 231, is  
21 it not?

22 I think if you look at page 12 of

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1 page 231.

2 A Well, they don't have page  
3 numbers. For the sake of brevity I'm going to  
4 say yes. Let's go ahead.

5 Q It's page 234, I've been  
6 corrected.

7 A I'm at 234 now.

8 Q Yes.

9 A And you would direct my attention  
10 to where, to page 12 did you say?

11 Q Yes. I'll represent to you that  
12 it is, in fact, the same ad.

13 A I believe you.

14 Q And looking at the ad, either on  
15 page 14 or at the exhibit --

16 A Yes.

17 Q Take a look.

18 A I'm looking. Yes.

19 Q Do the words "webcasting music"  
20 appear in that ad?

21 A No, the words "webcast" or  
22 "webcasting" nor the word "music", these do

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1 not appear in this advertisement.

2 Q And again, if you would look at  
3 web 462 which starts at the bottom of page 14?

4 A I see it.

5 Q Could you take a look at that?

6 A I'm going to go out on a limb and  
7 say neither the word "webcast" nor the word  
8 "music" appears in the ad.

9 Q And would include the phrase  
10 "webcasting music", right?

11 A Neither "webcast", nor  
12 "webcasting" nor the word "music", they do not  
13 appear in this ad.

14 Q Now turning to page 231 which is  
15 identified as a blueprint for growth?

16 A Exhibit 231?

17 Q Yes.

18 A I'm there.

19 Q And if you -- I don't think these  
20 pages -- two, three, four, five, six -- my  
21 sixth page at the bottom has a paragraph  
22 stating "a new music service."

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1           A       I see it.

2           Q       So in the middle of the paragraph  
3 here, it says "the depth of variety and  
4 richness of the music in public radio is  
5 nearly impossible to find and explore even for  
6 the most intrepid, knowledgeable and dedicated  
7 listeners. NPR will lead an exploration to  
8 develop a multi-genre digital music service  
9 that will build distributive value for NPR.  
10 Producers and stations will reinforce public  
11 radio's role in defining and presenting music.  
12 The new service will make it easy for the  
13 audience to find, audition, explore, share,  
14 store and purchase music in all its forms."

15                   In anything that I just read, do  
16 the words "webcasting music" appear?

17           A       The word "music" appears, but I  
18 did not see the word "webcast" or  
19 "webcasting."

20           Q       Okay. Now you would agree that  
21 underwriting is essentially different than  
22 advertising?

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1           A     No. I won't agree with that.

2           Q     Well, you would agree that  
3 underwriting has restrictions imposed on it  
4 that advertising does not?

5           A     I'll agree that there are  
6 differences between them that may relate to  
7 their form in which they're offered, but  
8 underwriting is clearly a form of advertising.  
9 In fact, Ruth Seymour said as much in the  
10 recent Wall Street Journal article. She said  
11 and you may have it with you, but my  
12 recollection is that she said some call it  
13 advertising, we call it underwriting.

14                     I think that's my point that is  
15 that one calls it advertising and the other  
16 calls it underwriting, but I don't think  
17 they're fundamentally different.

18           Q     So you're not aware of the FCC  
19 regulations that restrict the ability to  
20 engage in underwriting?

21           A     No, I'm not saying that there  
22 aren't differences. I'm saying --

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1 Q Is that a yes or no?

2 A What? Am I aware of FCC  
3 restrictions?

4 CHIEF JUDGE SLEDGE: We can't get  
5 a good record with two speaking at the same  
6 time.

7 BY MR. TAYLOR:

8 Q The question is are you aware, yes  
9 or no, that there are FCC regulations that  
10 govern and restrict the ability to engage in  
11 underwriting?

12 A Yes.

13 Q And you don't think that these  
14 regulations make underwriting different than  
15 advertising?

16 A No, there are similar restrictions  
17 on advertising as well that the FCC has.

18 Q Okay.

19 A So they both have restrictions  
20 from the FCC.

21 Q What exhibit are we now on? R-21.

22 (Whereupon, the above-

1 referred to document was  
2 marked as Services  
3 Exhibit R-21 for  
4 identification.)

5 Mr. Griffin, could you do me the  
6 favor of reading this for us?

7 A I was riveted and did so upon your  
8 handing it to me. So I can assure you now  
9 that I have reviewed it.

10 Q Could you read it out loud for us?

11 CHIEF JUDGE SLEDGE: We don't need  
12 it read out loud.

13 THE WITNESS: Thank you, Your  
14 Honor.

15 BY MR. TAYLOR:

16 Q Does this look like an  
17 underwriting announcement?

18 A It's an announcement of some kind.  
19 I mean it wouldn't shock me to hear such a  
20 thing, to be honest with you.

21 Q Does it look like basic  
22 advertising that an advertiser will seek to

1 put on commercial radio?

2 A I wouldn't be surprised to hear it  
3 on the radio from any kind of station, truly.

4 Q And why is that?

5 A Because I look at this and I know  
6 where you're going and I think gee, could I  
7 hear this on public radio? And I think I  
8 could. Would it be the most normal kind of  
9 advertisement? No, but that's not what the  
10 kind of advertisement that an NPR or a public  
11 radio advertiser typically puts on. But if  
12 they were sponsoring such a thing, they might.  
13 It wouldn't shock me.

14 Q The question is would you expect  
15 to hear this on a commercial radio station?

16 A Well, sure. You could hear this  
17 on commercial radio assuming again that the  
18 person had not been somehow paid under the  
19 table or somehow violated the FCC rules, which  
20 do apply to advertising. But sure, you can  
21 hear this on the radio.

22 Q And what aspect of the text

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1 indicates to you that it is an advertisement?

2 A Just that it mentions the name of  
3 a commercial business.

4 Q Is there anything else here?

5 A Well, there's a price. There's a  
6 phone number. I mean, sure. They want you to  
7 call that number. I'm not sure where you're  
8 going with this.

9 Q That's okay. If you could just  
10 answer my questions, we can get through this  
11 quickly. So this is a message that you would  
12 expect to see on NPR?

13 A See on NPR?

14 Q Excuse me, hear on NPR?

15 A Hear on NPR.

16 Q Yes?

17 A It wouldn't shock me to hear it.

18 Q And are you aware that the FCC has  
19 held this specific announcement in violation?

20 A Doesn't surprise me. It very well  
21 could have been held in violation.

22 (Pause.)

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1           Q     Mr. Griffin, have you read the  
2 announcement?

3                     (Whereupon, the above-  
4 referred to document was  
5 marked as Services R-22  
6 for identification.)

7           A     Indeed, I have.

8           Q     Does this announcement, is this an  
9 announcement that you think an advertiser  
10 would want to put on commercial radio?

11          A     No, this couldn't be their phone  
12 number, so they would be appalled to note that  
13 the phone number was an inaccuracy, and they  
14 would demand the return of their funds as soon  
15 as possible. The poor woman whose number that  
16 this ended at, 2000, would be complaining. It  
17 might make the newspaper --

18          Q     Mr. Griffin, I want to thank you  
19 for pointing that out, that it is in fact a  
20 typo. But putting that aside for our  
21 indulgence here, would you think that  
22 commercial enterprise would want this put on

1 commercial radio?

2 A Wouldn't surprise me.

3 Q And do you think that -- do we  
4 agree that this advertisement is a little less  
5 sophisticated than the one we previously  
6 looked at?

7 A Might be. Don't know, I don't  
8 think sophistication is my bailiwick, but I  
9 will say -- might be a little more  
10 sophisticated. It doesn't have the woof,  
11 woof, woof, woof attached to it or  
12 indecipherable sounds which you have mentioned  
13 over here.

14 Q And nor is there anything about  
15 music in the text?

16 A Nor is there anything about music  
17 -- right, there's nothing about music in the  
18 text. That's right.

19 Q Do you see anything about prices?

20 A Do not see a word about prices,  
21 that's right. I don't see it.

22 Q So we can agree that announcement

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1 number two is less sophisticated than the  
2 first one.

3 A I'm not going to give you relative  
4 sophistication of advertisement.

5 Q Well --

6 CHIEF JUDGE SLEDGE: Sustained.  
7 Mr. Taylor, Mr. Griffin has already said that  
8 media people aren't sophisticated.

9 (Laughter.)

10 THE WITNESS: You've got that  
11 right.

12 MR. TAYLOR: That statement I will  
13 accept.

14 BY MR. TAYLOR:

15 Q Are you aware whether the FCC has  
16 made a ruling on this specific?

17 A No, I would send them to a lawyer,  
18 which I am not.

19 Q Does it surprise you if I tell you  
20 that the FCC, in fact, has said that this is  
21 prohibitive.

22 A You know what? Wouldn't surprise

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1 that the FCC said anything or changed its mind  
2 a year later. Wouldn't shock me at all.  
3 Different Presidents, different Boards.  
4 Couldn't surprise me.

5 Q Passing out Exhibit 23, Services  
6 Ex R-23.

7 (Pause.)

8 (Whereupon, the above-  
9 referred to document was  
10 marked as Services  
11 Exhibit R-23 for  
12 identification.)

13 Q Mr. Griffin, have you read  
14 Services Rebuttal Exhibit 23?

15 A Yes.

16 Q And do you think it is an  
17 announcement that you would expect to hear on  
18 a commercial radio station?

19 A Could hear it on commercial radio.

20 Q Is it an announcement that you  
21 believe could be heard on noncommercial?

22 A If the pattern is the same, you're

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1 going to tell me that they ruled it illegal  
2 and that's not going to surprise me either  
3 because by definition if it was ruled illegal,  
4 it was run on NPR. So the only way a Judge  
5 could have ruled this not allowable would be  
6 if they actually used them, which I'm not  
7 surprised by because --

8 CHIEF JUDGE SLEDGE: Your speech  
9 is delaying our proceeding.

10 THE WITNESS: Understood.

11 MR. TAYLOR: Your Honor --

12 CHIEF JUDGE SLEDGE: Sustained.

13 BY MR. TAYLOR:

14 Q So Mr. Griffin, you realize that  
15 the FCC -- that I'm about to tell you that the  
16 FCC did, in fact, rule this is as prohibitive  
17 on a non-commercial station.

18 A I believe you.

19 Q And for the very last one, I saw  
20 that for the Board and I thank them for  
21 indulging me.

22 (Whereupon, the above-

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1 referred to document was  
2 marked as Services  
3 Exhibit R-24 for  
4 identification.)

5 Mr. Griffin, this one says Calvary  
6 88.5 thanks Borrough Photography for their  
7 support. Jeff Borrough, a Calvary graduate,  
8 has owned and operated Borrough Photography  
9 for over seven years. Jeff can be reached at  
10 (816) 332-9263. Jeff is a member of the  
11 Professional Photographers of America and  
12 specializes in weddings, family portraits,  
13 either on location or in studio. (816) 332-  
14 9263.

15 Do you find anything offensive  
16 about this ad?

17 A No.

18 Q Does it have anything about price  
19 in it?

20 A Not that I can see.

21 Q Does it have any comparisons  
22 between it or another product?

1           A       He's a member of an association  
2       that differentiates him from others.   He  
3       specializes in weddings, family portraits. He  
4       works both location and in studio.   Those  
5       could be relative references to others, some  
6       of whom have studios, others whom do not; some  
7       who specialize in weddings and family  
8       portraits, others who do not; some who belong  
9       to the Professional Photographers Association;  
10      others who do not.   He's also   Calvary  
11      graduate.   Others may not be.   And he has  
12      owned it for seven years.   Others may not have  
13      his experience.

14           Q       Do you have an understanding of  
15      what the FCC -- excuse me, the FCC's enhanced  
16      underwriting regulations proscribe?

17           A       No.

18           Q       And do you believe that this is a  
19      commercial -- excuse me.   Do you believe that  
20      this would be an advertisement that you would  
21      expect to hear on commercial radio?

22           A       Would not surprise me.



1 Q And are you aware that the FCC  
2 has, in fact, said that this is prohibited on  
3 noncommercial stations?

4 A Wasn't aware of it.

5 MR. TAYLOR: Nothing further, Your  
6 Honor.

7 CHIEF JUDGE SLEDGE: Mr. Handzo,  
8 any further testimony?

9 MR. HANDZO: I have a few  
10 questions, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. HANDZO:

13 Q Mr. Griffin, let me ask you to  
14 turn to Exhibit 230 of your testimony.

15 A I'm there.

16 Q You're ahead of me. You were  
17 asked some questions with respect to this  
18 exhibit about whether -- I'm sorry, on page 14  
19 of this exhibit, about whether weekly Internet  
20 radio listeners buy more or less music, do you  
21 see that?

22 A Yes.

1           Q     And I just want to be clear on  
2     your answer, were you indicating that people  
3     who like music enough to listen to Internet  
4     radio also like music enough to buy a lot of  
5     music or were you indicating that there is  
6     some causal connection between people  
7     listening to Internet radio and buying music?

8           A     I was referring to the coincidence  
9     that, of course, people who listen to music  
10    buy music.

11          Q     Now if you could turn, if you  
12    would, to page six of your testimony.

13          A     I'm there.

14          Q     Beginning with the second  
15    sentence, Mr. Joseph asked you some questions  
16    about your statement that broadcasters know  
17    that webcasting is both the key to unlocking  
18    additional revenue and a defensive move to  
19    prevent the loss of audience and it goes on  
20    from there. Do you see that?

21          A     Yes.

22          Q     And what he asked you was whether

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1 you had, I think had done any specific studies  
2 or surveys about that and I think your answer  
3 was no, do you recall that?

4 A That's right.

5 Q How do you know that broadcasters  
6 know that webcasting is the key?

7 A I know that because broadcasters  
8 tell me this.

9 Q In what context do you have those  
10 conversations with them?

11 A Well, I mean as an example, I was  
12 talking to the CEO of CBS Radio which was  
13 Infinity Radio and he said just this, we need  
14 to get more stations online and fast. And we  
15 need to do this because we want to make our  
16 numbers, we want to grow our revenues.

17 Q So your information in this regard  
18 comes not from surveys or studies, but from  
19 direct contact?

20 A Yes, with clients.

21 Q Now let me ask you to take a look  
22 at Services Rebuttal Exhibit 18 that Mr.

1 Joseph showed you.

2 A Let me go there.

3 (Pause.)

4 I'm there. I've got it.

5 Q Looking at the first page.

6 A Yes.

7 Q You'll see, I think starting with  
8 the second sentence, it says "stations that  
9 stream stand to gain a significant amount of  
10 listening because they provide well known  
11 assessable music and entertain those searching  
12 for online entertainment. Streaming also  
13 allows stations to provide their local  
14 audience with simple well-known alternatives  
15 to online options like AOL Radio or stations  
16 around the U.S. and around the world."

17 Do you see that?

18 A Yes.

19 Q And does that accurately reflect  
20 what you're hearing from broadcasters?

21 A Yes.

22 Q You were asked some questions by

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1 Mr. Joseph about whether Boeing had terminated  
2 its wireless service on airlines like  
3 Lufthansa?

4 A Yes.

5 Q And you indicated that you knew  
6 why that happened?

7 A Yes.

8 Q Why did it happen?

9 A My understanding is is that Jet  
10 Blue which was bidding for frequencies at  
11 roughly the same time as this news came,  
12 disclosed that it was going to do this in a  
13 partnership that would be able to do this at  
14 a much lower price, with a slightly different  
15 technology that would effectively price Boeing  
16 out of the market with the methods that it  
17 would be using.

18 Q And looking at Services Exhibit 20  
19 which is what the Judge showed you in  
20 connection with this?

21 A Yes.

22 Q And looking at the second to last

1 paragraph, do you see what Lufthansa says  
2 about whether they intend to continue offering  
3 such a service?

4 A Yes.

5 Q And what is that?

6 A They say it will be available  
7 further on, that their customers are happy for  
8 having this on board.

9 Q Lastly, Mr. Griffin, if you turn  
10 to SoundExchange or Exhibit 234 that Mr.  
11 Taylor asked you about, these are the NPR ads?

12 A Yes.

13 Q And if you would turn to one that  
14 he asked you about on page 12?

15 A Yes.

16 Q Number 1484?

17 A Yes.

18 Q And you'll see in the first  
19 sentence there it says that this position  
20 coaches and managers a team of representatives  
21 who secure corporate sponsorship for NPR on  
22 air and digital programming.

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1 A Yes.

2 Q My question is do you have an  
3 understanding of what digital programming  
4 means in this context?

5 A I believe it's referring to the  
6 digital delivery of their content, as opposed  
7 to the terrestrial delivery.

8 Q Would that include webcasting?

9 A Yes.

10 Q That's all I have, thank you.

11 CHIEF JUDGE SLEDGE: Any further  
12 questions?

13 MR. LARSON: None from me, Your  
14 Honor.

15 CHIEF JUDGE SLEDGE: Mr. Joseph?

16 MR. JOSEPH: Your Honor, given the  
17 hour, what I have isn't important. Thank you.  
18 I'll say no.

19 CHIEF JUDGE SLEDGE: Any questions  
20 from the bench?

21 Thank you, sir. That ends your  
22 testimony.

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THE WITNESS: Thank you.

(The witness was excused.)

CHIEF JUDGE SLEDGE: And that completes the evidence to be presented this week, with a holiday tomorrow. We resume Monday morning at 9:30 with Professor Pelcovits.

We'll be in recess.

(Whereupon, at 3:57 p.m., the hearing was adjourned, to reconvene Monday, November 27, 2006 at 9:30 a.m.)



CERTIFICATE

This is to certify that the  
foregoing transcript in the matter of:

The Digital Performance Right in  
Sound Recordings and Ephemeral  
Recordings  
Webcasting Rate Adjustment  
Proceeding

Before:

Copyright Royalty Board  
Library of Congress

Date:

November 22, 2006

Place:

Washington, D.C.

represents the full and complete proceedings  
of the aforementioned matter, as reported  
and reduced to typewriting.

  
John Mongoven